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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THILDE CARDONER,

Appellant,

vs.

ENE R. DAY, ELEANOR DAY BOYCE, WARD BOYCE, HARRY L. DAY, F. M. THROCK, L. W. HUTTON, AUGUST ULSEN, F. P. MARKWELL, C. A. MARK-LL, MARY SEAWELL MARKWELL, EFFIE RKWELL LOUBAUGH, ELIZABETH TH MARKWELL, EMMA MARKWELL, CHANAN, BLANCHE DAY ELLIS, HARRY ALLEN AND THE HERCULES MINING MPANY,

Appellees.

BRIEF OF APPELLANT.

ETIENNE DE P. BUJAC,
Carlsbad, New Mexico,

CHARLES R. BRICE,
Roswell, New Mexico.

No. 3273

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATHILDE CARDONER,
Appellant,

vs.

EUGENE R. DAY, ELEANOR DAY BOYCE, EDWARD BOYCE, HARRY L. DAY, F. M. ROTHROCK, L. W. HUTTON, AUGUST PAULSEN, F. P. MARKWELL, C. A. MARKWELL, MARY SEAWELL MARKWELL, EFFIE MARKWELL LOUBAUGH, ELIZABETH SMITH MARKWELL, EMMA MARKWELL, BUCHANAN, BLANCHE DAY ELLIS, HARRY R. ALLEN AND THE HERCULES MINING COMPANY,
Appellees.

STATEMENT OF NATURE AND RESULT OF SUIT.

This suit was brought by Mathilda Cardoner against Eugene R. Day and the other defendants in this suit by bill in equity filed in the District Court of the District of Idaho, Northern Division, to cancel and rescind a certain deed dated 20th day of October, 1916, made by Mathilda Cardoner to Eleanor Day Boyce conveying to her an undivided one-sixteenth interest in certain mining properties fully set out in said deed, a copy of which appears at pp. 28-54 of the

record. Said deed also conveyed certain personal property and other property owned by The Hercules Mining Company. The principal property was an undivided one-sixteenth interest in what was known as the Hercules mine, together with other mines near or adjacent thereto, and a one-sixteenth interest in all property owned by The Hercules Mining Company, a copartnership, and certain lots in the towns of Burk and Murray, Idaho. Plaintiff also sued to remove the cloud upon plaintiff's title to said real property and to recoer possession of said real and personal property.

Said cause was tried before Hon. Frank S. Dietrich, District Judge, and judgment given in behalf of the defendants, (appellees) on the 4th day of February, 1918.

Thereafter, the plaintiff Mathilda Cardoner, by her attorneys E. P. Bujac and C. R. Brice, filed a petition for appeal therein, which said petition was allowed on July 30, 1918, (Tr. p. 1402) fixing the appeal bond at $500.

That on July 27, 1918, plaintiff filed her assignments of error (Tr. 1403), and likewise on the same date filed her appeal bond (Tr. 1411); praecipe for record was duly filed (Tr. 1413) and citations duly issued and served (Tr. 14-15). Orders were entered extending the time for the filing of record in this court until Dec. 25, 1918, as shown by the records of this court. The record was filed in this court on the 23rd day of December, 1918, and is now before this court for review of the judgment of the United States District Court of Idaho in said cause.

PLEADINGS.

Plaintiff filed her bill in equity in the United States District Court of Idaho June 4, 1917, alleging diverse citizenship and all necessary jurisdictional matters, and further that the plaintiff was the widow of Damian Cardoner who had lived prior to 1906 in Idaho, but since said date and

until his death had lived in Spain, plaintiff liing with him. That during his lifetime he was a member of the mining partnership known as The Hercules Mining Company, the other partners being Eugene R. Day, Eleanor Day Boyce, Edward Boyce, Harry L. Day, Jerome J. Day, F. M. Rothrock, L. W. Hutton, August Paulsen, F. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Loubaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan and Blanche Day Ellis. That said partnership owned a number of mining claims, water rights and other property commonly known as the "Hercules Mine," and referred to by this name, and also the owner of valuable mills, smelters and refineries, stocks, bonds and other corporate issues, some held in the name of natural persons and corporations for the partnership, and that Damian Cardoner had owned a one-sixteenth interest in the partnership and partnership property.

That Damian Cardoner died in the Canary Islands Feb. 28, 1915, leaving the plaintiff and one daughter his only heirs, and that the Hercules mine and all property involved in this suit was community property of the said Damian Cardoner and plaintiff, the principal estate being the one-sixteenth interest in the Hercules Mine. That Eugene R. Day, the defendant, was appointed the administrator of the estate because of his familiarity with the values and properties of the Hercules mine; the order appointing him reciting that he was appointed because of his peculiar knowledge of mines and mine alues, and particularly of the Hercules group. That the Probate Court of Shoshone county, Idaho, possessed of complete jurisdiction, entered an order settling the administrator's final account and decreeing final distribution on October 11, 1916, and by said decree said property was distributed to and decreed to be the property of the plaintiff, the widow of Damian Cardoner.

That plaintiff was 63 years of age, of foreign birth and unacquainted with the business customs of Idaho or the United States, that for several years she had been in bad health, suffering from asthma and nervous disorders superinduced by that disease; that during his lifetime Damian Cardoner managed the business affairs and property of the community of himself and plaintiff and never gave plaintiff definite information concerning its values or earnings; that at his death plaintiff knew nothing of the value or earnings of the partnership property aforesaid, having only a general impression that it was of considerable value and that the rents from it were large. That she knew Eugene R. Day had for a long time been the manager of the property and that his management had been successful, and believed his business capacity and integrity might be confidently relied upon, for which reasons she desired his appointment as administrator of the estate. After his appointment as administrator she sought to ascertain from him the value of the property and the average returns thereof but he evaded her inquiries and gave no definite information concerning the same; that during the administration only two dividends were paid by said mine, though the earnings would have warranted much more frequent and greater payments, and that the distribution of the profits were purposely postponed in order to mislead plaintiff as to the value and earnings of the mine. That on several occasions during administration Eugene R. Day inquired of plaintiff if she wished to sell her interest in the partnership property and she declined to consider a sale. In the latter part of October, 1916, one Henry R. Allen, acting under the direction of said Day and Eleanor Day Boyce, professing to speak purely as a friend of plaintiff, with intent to deceive her, stated to her that the Hercules mine was practically worked out, that it was a pure speculation whether any more ore would be discovered and that the Hercules mine did not pay any dividends for four

months when lead was high; that the Day family, who was in charge of the mine, were speculating in the metal market with the mine's money and would likely lose everything, that they were bucking the Guggenheims who had too much money for the Days and that the latter would be smashed. That the people in Spain claiming under her husband's will would likely cause her trouble and might come to this country and get her interest in the mine from her unless converted into cash, and urged plaintiff to sell her interest in the mine as speedily as possible, and if she did not do so her interest would be valueless.

That the said Allen, as a part of the scheme for procuring plaintiff's interest in the Hercules mine, figured out on paper that the mine was worth only $5,000,000, all of which representations were false and untrue, and were made by Allen in behalf of his undisclosed principals, Eugene R. Day and Eleanor Day Boyce.

In consequence of said representations plaintiff was alarmed and believing she must speedily dispose of her interest in the mine or lose it, she thereupon told the said Allen to sell her interest in the Hercules property on the basis of $5,000,000, which authority was reduced to writing October 27, 1916, authorizing the sale of her one-sixteenth interest for $312,500.00 and her one-sixteenth interest in the cash on hand for $37,500, and certain real estate in the town of Burk for $20,000, making a total of $370,000, the terms being $50,000 cash and the balance in two weeks, no information being given her concerning any other property by the mining partnership and no other property was taken into account in fixing the price.

On October 28, 1916, Allen brought Eugene R. Day to close said contract; Day brought two checks, one for $45,000 and one for $5,000, which he gave plaintiff. He also brought the agreement of sale which had been signed by his sister Eleanor Day Boyce, and plaintiff thereupon signed

said agreement in the presence of Day. Allen and Day arranged with the vice president of a bank in Spokane to meet them there the next day and receive the escrow conveyance. Allen took plaintiff there the next day and went to the bank where Allen delivered in escrow to the bank the conveyance of such property, being the deed hereinbefore referred to, a copy of which is attached to plaintiff's bill marked "Exhibit A." At the bank Allen claimed the $5,000 check for services to the plaintiff and asked her to endorse it, which plaintiff did, being too confused and bewildered to protest, she having regarded Allen as the representative of Day and not herself; that this was part of the scheme to make Allen appear as her representative in the transaction.

That this conveyance remained in escrow until November 14, 1916, when the balance of the purchase money was paid into the bank. Upon such payment the deed of conveyance was delivered by the bank to Day and Mrs. Boyce and by them placed of record in the Recorder's office in Shoshone county, Idaho, and they entered into possession of the property and have ever since been in possession thereof, claiming title, and the other defendants, members of said mining partnership, have ever since and do now recognize the claim of Day and Eleanor Day Boyce to be the owner of plaintiff's interest in said mining property and partnership, and to receive from it the profits which in equity belong to the plaintiff.

At the time of said transaction Allen was believed by plaintiff to possess exceptional opportunity by reason of his connection with mining operations to know the value of the mine and its prospects, and what was being done in its operation; she believed him to be a man of integrity and upon whose statements she might rely, and was influenced in making the sale by his representations. Also, plaintiff had entire confidence in Eugene R. Day and thought as manager

of the property, as partner of her husband and herself and as administrator of her husband's estate she might confidently rely upon his knowledge of values and upon his good faith in dealing with her.

That plaintiff believed and charges that the representations made by Allen were suggested by Eugene R. Day for the purpose of deceiving and alarming plaintiff and causing her to dispose of her interests in the mine at an inadequate price.

At the present time and time of said transaction and for several years prior thereto said Hercules properties were and are of the value of not less than $20,000,000, and plaintiff alleges that said properties were and are of the reasonable value of $30,000,000; that the mine was not exhausted nor were there any indications that it was or might be exhausted; that the ore bodies were better developed and more valuable than ever before; the price of metals was higher and the mine was earning more money at the time of the transaction than it ever had. Plaintiff does not know and can not ascertain the amount of cash on hand at the time of conveyance but is informed and believes that her one-sixteenth interest was greatly in excess of $37,500. That had plaintiff known the real condition of the mine, its approximate value, the amount of money on hand and other property owned by the partnership and had not been deceived and frightened by Allen's false representations she would not have agreed to sell her interest therein and would not have executed said conveyance. At the time she executed said exhibit A that was read to her in the most casual manner; her attention was not directed to the provisions in said conveyance by which she conveyed her interest in all bills receiable notes, checks, bonds, mortgages and stocks and in and to any and all property of any name, character and description belonging to or owned by the company, whether standing in the name of the company or not.

She was lead to believe and did believe that the only property owned by the company was its mines, machinery and fixtures and cash on hand derived by its operations and not then distributed in dividends, and at the time of the decree of distribution to her by the Probate Court of Shoshone county, Idaho, she did not know that the general words used in that decree mentioning bills receivable, notes, bonds, etc., represented any property owned by the Hercules Mining Company or claimed by it other than its mines, equipment and cash on hand, and no explanation was made to her by the defendant Eugene R. Day or anyone else as to the meaning or significance of these words either in the decree of distribution to her, or in Exhibit "A" to this bill, and at the time of completing the sale she did not know and no one explained to her that the mining partnership owned any stock or other interest in any smelter or refinery, and she did not know and no one explained to her that the mining partnership had large quantities of ore in transit from the mines to smelters or refineries and on which payment had not been received and of which she, as a member of the mining partnership, was entitled to one-sixteenth interest.

That on October 28, 1918, and many years prior thereto Eugene R. Day had been the General Manager of the mining operations, and the marketing of the ores of this company and was conducting the operations under a salary paid him by the partnership, and was the agent of the several owners of the property and of the several members of the partnership, and on that date and for many years theretofore he had been and was an experienced mining man, capable of judging ore bodies and forming an opinion as to the probable permanency and probable value; as manager of the mine he was familiar with its every detail, with the extent of the ore bodies as they had been worked up to that date, with their value, with the cost of mining and treating, with the market demand for the ore, and with every element that

entered into a determination of the value of the mine as based upon its previous history. He had become familiar with the deeloped ode bodies which had not yet been worked, with the appearance in situ of those ore bodies, with their probable permanency, with the then existing demand for the ore and the prevailing price, and with every element that entered into the probable future value of the mine. In said capacity he was familiar with the smelter at Northport in which the mining company had an interest, and with the refinery at Pittsburgh in which they had an interest, and prices paid by the mining partnership for these properties; with the advantages it gave to the partnership for the treatment of ores and the increased profits to be derived from treating the ores in the smelter and refinery, and he was familiar with the profits made by the partnership from said smelter and refinery. As administrator of the estate of plaintiff's husband he had likewise become familiar with the condition of her husband's affairs, with the possibility of some question being made as to her right to her husband's interest in the Hercules mine and mining partnership, and the general financial condition of her husband's estate, and what her business and financial conditions would be after closing the administration.

Plaintiff knew of his joint ownership with her in the mine and his position as manager of the partnership and knew that her husband and other members of the partnership had trusted him, and because of that trust she desired him to be administrator of her husband's estate, and as such administrator he had obtained her entire trust and confidence. During her husband's lifetime she had paid no attention to the business affairs, she trusted her husband implicitly in all these matters and received from him only such general information as he would happen to give her in the course of their general conversations. She had at no time any knowledge as to the different properties owned by said partner-

ship nor as to their ownership of any interest in the smelter or refinery, and had she known of same she would have had no knowledge as to the values. She had no knowledge as to the extent and profits of the operations of the partnership or what might probably be expected in the future operations. That at no time during the negotiations that led up to the contract of October 28, 1916, or at any other time did the defendant Eugene R. Day and Eleanor Day Boyce or any one else make any statement or disclosure to her or statement to her of any of the matters and things pertaining to the value of said mines and of the property owned by the mining partnership, or any statement or explanation as to their values, or as to their probable future values, or as to their probable future earnings, or any disclosure or explanation that in any way tended to disclose to her the value of her property rights in these mines and assets of the mining partnership, except the false and fraudulent statements hereinbefore alleged, and that the defendant Eugene R. Day well knew in respect to all these matters and things she did not have knowledge, and well knew had he disclosed to her the true values of these properties or condition, or disclosed to her all the properties the partnership owned plaintiff would not have executed to him the bill of sale, Exhibit "A."

That plaintiff did not discover the fraud practiced on her until December, 1916, and upon discovering it notified the defendants Eugene R. Day and Eleanor Day Boyce that they had obtained the conveyance of her interest in the Hercules mine by misrepresentation and fraud, and that she elected to rescind the transaction and would return the consideration and require a reconveyance of the property; that she had not withdrawn from the bank or used any of the purchase price paid for the conveyance, and on January 9, 1917, tendered to the defendants Eugene R. Day and Eleanor Day Boyce the $370,000 paid into the bank by them, together with interest thereon, and demanded a re-

conveyance of the property. That they refused the tender and declined to reconvey. That the plaintiff has no desire to rescind the conveyance of the realty in the town of Burk, but if the transaction is deemed entire, or if the defendants require a rescission with respect to the Burke property, or if it is decreed by the court plaintiff stands ready to return the purchase price of such realty upon its reconveyance to her. That plaintiff is entitled upon rescission to the profits accruing to her interest in the partnership property from the payment of the last dividend to her, but she does not know the amount. She avers her readiness to do equity, to pay into court upon an accounting and order of the court therefor the entire purchase price paid by the defendants, with interest, or such part thereof, or such sum of money as the court may find proper to be paid, in order to do equity between the parties, and to do whatever other things may be meet and equitable to put the parties in the condition in which they were heretofore

Plaintiff can not ascertain without an inspection of the mining books of the partnership what the value of the mine is and its profits and the amount of money on hand at the time of the conveyance; that she can not discover what the several interests of the members of the partnership are in the one-sixteenth interest acquired from her, whether it was acquired for all the members of the partnership or for the members of the Day family, or for Eugene R. Day and Eleanor Day Boyce, or for Eugene R. Day individually. (Paragraph 9 of the bill, which it is deemed unnecessary to set out herein, asks for a discovery with reference to the interests of the partnership, and alleges other matters unnecessary, as we belie, to set out herein, and refer the court thereto for more specific detail.)

Plaintiff prayed for an accounting between the members of the partnership and an adjustment of the equities; for an accounting for the operation and profits of the mine, for

a rescission of the conveyance, and that all members claiming an interest in the property be decreed to reconvey to her her said interests. That there be ascertained what amount should be paid back by plaintiff on rescission and to whom it should be paid; that the court settle and adjust the equities between the parties to the transacion, and by its decree require each party to do whatever in equity should be done in the premises.

There was attached as Exhibit "A" to said bill the conveyance which it was sought to cancel and rescind. Also there was filed in said cause interrogatories Nos. 1 to 27 (Tr. pp. 56-51) to be answered by the defendants, the answers thereto appearing in the record at pp. 62 to 102 inclusive, the same being attached as exhibit to plaintiff's bill.

ANSWERS.

We do not find necessary for a proper understanding of this case to state the contents of any of the answers at length but refer to the record, except that we make the following general statements with reference thereto:

The defendants, and each of them, substantially deny all of the equities in plaintiff's bill; they deny any fraudlent intent on the part of Eugene R. Day, also the alleged false representations in connection with the sale of the Hercules mine, and substantially put in issue the allegations with reference to the alleged fraud, false representations and value of the mine and Hercules partnership property.

The answers of Jerome J. Day and Harry L. Day state they were innocent purchasers for value without notice of any fraud on the part of Eugene R. Day and Eleanor Day Boyce in the purchase each of an undivided one-fourth interest in the property conveyed by plaintiff to defendant Eugene R. Day, and that such purchase was made and the

purchase price paid before any of the contentions of plaintiff made in her bill were known to them.

All of the answers allege that the price paid plaintiff for the mine approximates a fair valuation thereof.

STATEMENT OF THE FACTS.

There are certain facts in connection with the transaction that are either not disputed or are admitted in the pleadings, among which are the following:

The plaintiff was 63 years old at the time of the trial in December, 1917, (Rec. p. 319); resided at Albuquerque, New Mexico, and had for a year previous to said date; went there for her health; that she and her husband left the State of Idaho for Spain (they had lived in this country for many years) in the year of 1906, where they had resided until her husband's death on the 28th day of February, 1915, (Rec. pp. 320-321); that from the year of 1906 until April, 1916, when she came to this country to look after her interests inherited from her husband, she had lived in Spain, (Rec. p. 323). She was born in France and came to America in the year of 1900, (Rec. pp. 323-4).

(The foregoing is taken from the testimony of plaintiff).

That she suffered from asthma and had traveled a good deal in attempting to find a place that would relieve her physical condition. (Testimony of Dr. Ahlquist, Rec. pp. 312-318.)

That her husband Damian Cardoner and herself owned as community property an undiided one-sixteenth interest in what was known as the Hercules mining partnership, the property consisting of the Hercules mine proper and a number of incidental properties; also some real estate in the town of Burke, Idaho.

Under the laws of the State of Idaho, an order was entered by the probate court of Shoshone county decreeing all of

said property to be community property of Damian Cardoner and the plaintiff, of which she became the owner and the same was accordingly distributed to her by decree of court, (See exhibit 46, order settling final account and decree of distribution, Rec. p. 1275). Eugene R. Day was appointed administrator of the estate of Damian Cardoner, deceased, (Rec. p. 1239), and was discharged as such administrator by decree of the probate court of Shoshone county entered on November 1, 1916, (Rec. pp. 1307-8).

That defendant Eugene R. Day was the managing partner of the Hercules Mining Company and was paid a salary out of the company's earnings contributed to by all of the members of the partnership, including the plaintiff, (Answer of Eugene R. Day, Rec. p. 176). The partnership consisted of the plaintiff and of the defendants, with the exception of Harry Allen (Answer of Eugene R. Day, Rec. 209).

Eugene R. Day was first approached by Harry Allen with reference to the sale of Mrs. Cardoner's interest in the Hercules mine on the 18th or 20th of October, 1916, (Testimony of defendant Eugene R. Day, Rec. p. 736), and the contract of purchase was entered into, and an escrow agreement made, on the 28th day of October, 1916, (Testimony of Eugene R. Day, Rec. pp. 742-3). The record does not disclose that the defendant Eugene R. Day and the plaintiff ever met or talked together from the date negotiations began for the purchase of said property on the or 20th of October until finally consummated on the evening of the 28th of October, 1916, and the record does not disclose that during said negotiations, or at any time after the said Day had become interested in the purchase of said property that he made any statements of any character to the plaintiff with reference to the value of the property or its assets, or any disclosure of any character with reference thereto. It is claimed, however, by the said Eugene R. Day that he made certain statements to her previous thereto,

which are disputed by the plaintiff and which will be particularly referred to hereafter.

The plaintiff, Mrs. Cardoner, first discovered the alleged facts upon which she has based her suit after the 18th day of December, 1916 (Tr. p. 580) ; she immediately retained Joseph W. Wilson as counsel, who employed Graves, Kizer & Graves as associate counsel on or about the 5th of January, 1917, and preparation was immediately made for filing this suit, which was filed shortly thereafter (Tr. p. 580).

When Eugene R. Day made the purchase of the property it was his intention to take his two brothers, Jerome J. Day and Harry L. Day and his sister, Eleanor Day Boyce, in as equal partners on the purchase, which arrangement was consummated as he had originally intended (Testimony Eugene R. Day, Rec. p. 872). Mrs. Cardoner, by her counsel, Willson, tendered to the defendants, Eugene R. Day and Eleanor Day Boyce, $370,000 and interest from date of payment to date of tender on January 9, 1917. (Stipulation of Porte's Tr. p. 573.)

The deed conveying all of said property to defendant Eleanor Day Boyce in consideration of $370,000 was executed on the night of the 28th of October, 1916, Day paying $50,000 cash (Rec. p. 623). An escrow agreement was signed at the same time (Rec. p 1310), and this with the deed was placed in the Old National Bank at Spokane, the deed to be delivered upon the payment of the balance of the purchase price on or before thirty days, (Rec. p. 623). The escrow agreement was taken up and the purchase price was paid by Eugene R. Day, Jerome J. Day, Harry L. Day and Eleanor Day Boyce in equal shares (Rec. p. 874), and said mining property is now held and owned by the above named four defendants in equal shares, for which they gave $350,000 to plaintiff, (Rec. p. 874). That the real estate in the town of Burke purchased in the same transaction is held in the name of Eugene R. Day (Rec. p. 875).

The testimony of the plaintiff is substantially to the efect that no information of any character was given to her by any one, especially Eugene R. Day, with reference to the value of the Hercules mine properties, or from which she could ascertain reasonably the value thereof, (Tr. 334) nor was she familiar with the value of said mine or any of the property.

The testimony with reference to the value of the mine and with reference to what disclosures were made by Eugene R. Day, the managing partner of the Hercules Mining Company prior to the purchase of the interest of the plaintiff will be discussed and quoted from fully in the argument, and it would but add unnecessarily to the length of the brief to quote the same here.

DECREE.

Final decree dismissing plaintiff's bill was entered on the 4th day of February, 1918, (Rec. 1401).

ASSIGNMENT OF ERRORS.

Plaintiff assigned the following errors for review of said case in this court: (Rec. 1403).

I.

The court erred in admitting in evidence the testimony of the witness Eugene R. Day, to the effect that in 1906 all of the partners of the Hercules Mining Company gave an option on their property to J. P. Graves to purchase the same for a consideration of six million dollars, as shown by the following proceedings:

(EUGENE R. DAY, Witness)

"Well, there were several options given. The one in

which all the partners joined was given to Mr. J. P. Graves. I haven't the option. It was not taken up. I have searched for a copy of the option. I don't know whether the paper was returned or not. I know they turned the option down. I have not been able to find it.

Q. Will you tell the court the date of it and what amount you would receive if the option had been taken up?

Mr. Graves: I am not certain that the time is apt. I wish to object, may it please the Court, as to any option given, as wholly immaterial and irrelevant. These were offers and options not acted upon, and not admissable in evidence in determining the value of any realty.

The Court: I don't know when this option was given yet. When was it given?

A. I think in 1906. I won't be positive.

Q. I ask you now what the amount to be paid under that option if it had been taken up?

Mr. Graves: To that I object, if the Court please, for the reason stated.

The Court: The objection will be overruled. While for some purposes an option is not receivable in evidence, it is indicative of the estimate in which the owners of the property held it. It is like an offer to sell. That would indicate the attitude of the owner of the property. The objection is overruled. He may answer the question.

Witness: The option was for $6,000,000.00. The option was not taken up."

II.

The court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the eidence shows: That at the time the defendant Eugene R. Day purchased plaintiff's interests in the partnership property of the Hercules Mining Company, the said Day

was a member of the partnership and the general manager of said partnership, and had been for many years, and that plaintiff was a partner who had no part in the management of the partnership affairs and had until a few months previously lived for ten years in Spain. That by reason of the position occupied by said Day he was familiar with all of the business of said partnership, and was possessed of and had access to all the information obtainable for determining the value of said property, and from which could have been determined the value or reasonably near the value thereof. That during the negotiations for the sale of said property, the defendant Day communicated no information to the plaintiff with reference thereto; that at the time of said sale she did not possess the information necessary to enable her to form a sound judgment as to its value, as was possessed by the said Day, and the information she had from the said Day and otherwise prior to said negotiations, was not all the information possessed by him and necessary to enable her to form a sound judgment as to the value of said property, and that the price paid for said property did not approximate nearly its real value, and was grossly inadequate.

III.

That the court erred against the just rights of the plaintiff in entering a decree dismissing pliantiff's bill; in that the evidence shows: That at the time the defendant Eugene R. Day purchased plaintiff's interest in the partnership property of the Hercules Mining Company, the said Day was a member of said partnership, and had been for many years, and that plaintiff was a partner who had no part in the management of the partnership affairs, and had until a few months previously lived for ten years in Spain. That by reason of the position occupied by the said Day, he was familiar with all of the business of said partnership,

and was possessed of and had access to all the information obtainable for determining the value of said property, and was familiar with and knew approximately near its value, which information plaintiff did not possess. That the price paid by the said Eugene R. Day to the plaintiff did not approximate reasonably near to a fair and adequate consideration for the property purchased, but the consideration given by him to plaintiff was grossly inadequate, and known so to be by said Day at said time, and not known to plaintiff.

IV.

That the court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the evidence shows; that at the time the defendant Eugene R. Day purchased plaintiff's interest in the partnership property of the Hercules Mining Company the said Day was a member of the partnership and the general manager of the said partnership, and had been for many years, and that plaintiff was a partner who had no part in the management of the partnership affairs, and had until a few months previously lived for ten years in Spain. That at said time the defendant Eugene R. Day was familiar with all of the business of said partnership, and was possessed of and had access to all the information obtainable for determining the value of said property, which was sufficient to determine reasonable near its value, and was familiar with and knew approximately reasonabley near its value; and the evidence does not show that the price given for said property by the said Eugene R. Day approximated reasonably near the value thereof.

V.

That the court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the evidence shows: That at the time defendant

Eugene R. Day purchased plaintiff's interest in the partnership property of the Hercules Mining Company, said Day was a member of the partnership and the general manager of the said partnership, and had been for many years; that plaintiff was a partner who had no part in the management of the partnership affairs, and had until a few months previously lived for ten years in Spain. That the said defendant Eugene R. Day was familiar with all of the business of said partnership, and was possessed of and had access to all the information obtainable for determining the value of said property, from which could have been determined the value of reasonably near the value of said property, and the evidence does not show that all such information in possession of said Day which was necessary to enable her to form a sound judgment of the value of the said property was imparted by the said Eugene R. Day to the plaintiff before he purchased said property from her, or that at said time she possessed such information.

VI.

The court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the evidence shows: That the defendant Eugene R. Day, at the time he purchased of plaintiff her interest in the partnership property of the Hercules Mining Company, was the duly appointed, qualified, and acting Administrator with the will annexed, of the estate of Damian Cardoner, deceased, and that said property was a portion of said estate, and that such purchase was prohibited by Section 5543 of the Revised Statutes of the State of Idaho, and the same was void.

VII.

The court erred in that he found, ordered, and decided that the contract of purchase of plaintiff's interest in the Hercules Mining Company's property and town lots in the

town of Burke, Idaho, by defendant Eugene R. Day, before he was discharged as administrator of the estate of Damian Cardoner, deceased, was not void or voidable at the suit of plaintiff; for that said purchase was made void by the terms of Section 5543 of the Revised Statutes of the State of Idaho.

VIII.

The court erred in that he found, ordered, and decided that the plaintiff at thetime she contracted to sell her interest in the Hercules Mining Company property was informed of the known conditions and facts bearing upon the value of said property; because not supported by the evidence, is in direct conflict with the evidence, and has not evidence to support it.

IX.

The court erred in that he found, ordered, and decided that the price paid by defendant Eugene R. Day to the plaintiff for her intrest in the Hercules Mining Company's property approximated the reasonable market value thereof, in that it is manifestly against the great weight of the evidence.

X.

The court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the evidence shows: That at the time of the purchase by Eugene R. Day of plaintiff's interest in the property of the Hercules Mining Company he occupied a fiduciary relation with plaintiff, and possessed information with reference to the value of said property not possessed by her, which he d' not communicate to her at the time of such purchase, from which she could have judged approximately near the value of said property; and that the defendants Jerome J. Day, Harry L. Day, and Eleanor Day Boyce were not purchasers of an interest in said property without notice, or facts, t'

put them upon notice, of plaintiff's equitable rights.

For the purpose of simplifying the presentation of this case to this court we present this case under the following:

FINAL ISSUES.

1. Did the court err in the admission of the testimony set out in the first assignment of error?

(Under this issue we will consider assignment of error No. 1).

2. Did the defendant Eugene R. Day, prior to purchasing from plaintiff her interests in the partnership property of the Hercules Mining Company communicate to her all material facts known to him and obtained by him by reason of the position he occupied as managing partner of said mining enterprise, or did he conceal from her any such material facts so known to him; and which information was not known to her and which was necessary to enable her to form a sound judgment as might be as to the value of the Hercules mining property at thetime of such sale; and were all such disclosures made prior to such purchase as under the circumstances the law required of said Eugene R. Day to make to the plaintiff prior to the time of the execution of the deed and contract conveying said property to the defendant Eleanor Day Boyce?

(Under the foregoing final issue we will consider assignments of errors Nos. 2, 3, 4 and 5).

3. Did the price paid for appellant's one-sixteenth interest in the Hercules Mining Company's property, to-wit, $350,000, approximate reasonably near its value?

(Under the foregoing final issue we will further consider assignments of errors Nos. 2, 3, 4 and 9).

4. Could the defendant Eugene R. Day purchase the property in question from the appellant, he being administrator of the estate of her husband and said property being

a portion of said estate, and was said purchase prohibited and void by the terms of Sec. 5543 of the Revised Statutes of the State of Idaho?

(Under the above we will consider assignment of errors Nos. 6 and 7).

5. Were Jerome J. Day, Harry L. Day and Eleanor Day Boyce innocent purchasers each of an undivided one-fourth interest of the one-sixteenth interest in the Hercules Mining Company's property sold be appellant to Eugene R. Day?

(Under this issue we will consider the 10th assignment of error).

BRIEF OF ARGUMENT.

FIRST POINT.

The admission of the testimony of Eugene R. Day as to certain options given by the owners of the Hercules mine upon said property for $6,000,000 in the year of 1906 was error, in that the conditions ten years before the transaction in an actively worked mine, and especially under the facts disclosed in the evidence, would not be relevant in determining the value at the time of the sale from plaintiff to defendant, Eugene R. Day; it being too remote and conditions having entirely changed.

SECOND POINT.

If a partner who exclusively superintends the business and accounts of a partnership purchases the share of another partner, in order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and second, that all information in possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold was communicated by the former to the latter.

Authorities:

Brooks v. Martin, 2 Wall. 70-87.

Vol. 1 Rowly on Modern Law of Partnerships, Sec. 400-Sec. 342.

Nelson v. Matsch (Utah) Ann. Cas. 1912 D. 1124 and note

THIRD POINT.

If a partner who exclusively manages and superintends the firm's business buys the interest of a copartner, the transaction is presumptively fraudulent and the purchaser will be held *prima facie* to be a trustee at the suit of the seller without proof of fraud on his part; and courts of equity will throw upon the purchaser the burden of proving the entire fairness of the transaction.

Authorities:

Perry on Trusts, Secs. 194-195-206.

Rowley on Modern Law of Partnerships, Sec. 342.

Gilbert & OCollighan v. Anderson (N. J. Eq.) 66 Atl. 926.

See Vol. 38 Cent. Dig. Partnership, Sec. 142.

Elliott on Contracts, Sec. 74.

FOURTH POINT.

If a partner who exclusively manages and superintends a firm's business and thus obtains knowledge of facts which would assist in determining the value of the firm's property, buys the interest of a copartner who has not his knowledge and means of knowledge; the failure to disclose such knowledge to the seller so that he may have the benefit thereof in determining the value of the property is a fraudulent concealment and the contract may be avoided in equity or the buyer may be held as a constructive trustee.

Authorities.

Perry on Trusts, Sec. 178.

Rowley on Modern Law of Partnerships, Sec. 400 and cases cited.

Byrne v. Jones 159 Fed. (C. C. A. 8th Circuit)

Michond v. Girod 4 How. 555 11 L. Ed. 1076.

Nelson v. Matsch (Utah) Ann. Cas. 1812 D. 1242. Note good.

Goldsmith v. Koopman 152 Fed. 173.

FIFTH POINT.

Under Sec. 5543 of the Revised Statutes of the State of Idaho, the defendant Eugene R. Day was prohibited from purchasing the property conveyed to him by plaintiff Mathilda Cardoner, he being at the time administrator of the estate of her husband and said property being a portion of said estate. By the terms of said statute said contract was void and no subsequent ratification thereof could validate such contract.

Authorities.

Revised Statutes of Idaho, Sec. 5543.

SIXTH POINT.

It appearing from the undisputed testimony of the defendant Eugene R. Day that he purchased the one-sixteenth interest of the mining property of the Hercules Mining Company form the plaintiff Mathilda Cardoner for the purpose of permitting the defendants Harry L. Day, Jerome J. Day and Eleanor Day Boyce to share in such purchase, if they so desired, and they having subsequently shared in such purchase, the whole purchase and distribution among the four defendants becomes one transaction and they are not innocent purchasers of the property conveyed to them but are bound by all the notice possessed by defendant Eugene R. Day at the time of such transfers.

Authorities:

Title "Ratification," 2 C. J. 467.

SEVENTH POINT (Fact).

The testimony establishes the fact that the plaintiff Ma-

thilda Cardoner, owning a one-sixteenth interest in the Hercules mining proprties, sold the same to Eugene R. Day, the managing partner and who had been such managing partner for six years or more, while she had lived in a foreign country, and that he failed to disclose to her all the material knowledge which he had obtained by reason of his position as manager, from which she could form a just and fair judgment as to the value of said property, and especially he failed to disclose to her the earnings of said mine which at the time was within his knowledge.

EIGHTH POINT (Fact).

The testimony does not show that the consideration paid for the one-sixteenth interest in the Hercules mining property sold by plaintiff to the defendant Eugene R. Day, who at the time was the managing partner of the partnership, was approximately near the real value of said mine.

NINTH POINT (Fact).

The testimony shows that the consideration paid to plaintiff Mathilda Cardoner by defendant Eugene R. Day for her one-sixteenth interest in the Hercules mining properties was grossly inadequate.

TENTH POINT (Fact).

The testimony shows at the time of the purchase of the one-sixteenth interest in the Hercules mine by Eugene R. Day from Mathilda Cardoner that the said Eugene R. Day was the administrator of the estate of Damian Cardoner, deceased, and that said property was a part of said estate.

ARGUMENT.

I.

The first final issue adopted for convenience in arguing this case is as follows:

"Did the court err in the admission of the testimony set out in the first assignment of error."

The testimony mentioned has already been copied in this brief and appears in the first assignment of error at page 1403 of the record, and is substantially to the effect that an option was made by the owners of the Hercules mine in the year of 1906 whereby they gave an option on said mine and mining properties for $6,000,000.

The contention is made under the testimony this was too remote and could not possibly establish the value of the mine on October 28, 1916, and be of assistance in developing such fact. If the admission of this testimony was error, it can not be said to be harmless error because the court gave considerable weight to it in determining the value of the mine. (See decision of court, Tr. p. 1394.)

To show the fallacy of basing any correct judgment upon offers for the sale of this mine at remote times, we call the court's attention to the testimony of the witness Wood (Rec. p. 713), in which he says, "I knew of its location and they offered me a one-sixteenth interest for $1,600.00, which I regretted very much that I did not take, so I kept in touch with its development and what it has paid." Then again an option was given on this property in 1905 for $4,000,000 (Tr. p. 888), and the next year an option was given for $6,000,000 (Tr. p. 888). The latter was in 1906. The testimony shows that from the time the mine was opened in 1901 up until the year 1906 the net profits in round figures, a million and a half dollars. (See answer of Eugene R. Day to interrogatory No. 14, Rec. p. 72 et seq.) ; but beginning with the year of 1906 profits largely increased and exceeded three-quarters of a million average per year until the year of 1911. In 1911 the net profit was over a half million; in 1912 approximately three-quarters of a million; in 1913 approximately $1,200,000; in 1914 approximately $1,800,000; in 1915 approximately $1,100,000, and in 1916 for the first

ten months it was $2,368,682.90. (See answer of defendant Eugene R. Day to interrogatory No. 14, Rec. pp. 72 to 77, inclusive.)

It will thus be seen that for the ten months of 1916 the net profits of the mine equaled to almost one-half of the option price in 1906 after more than the option price had been taken out in net profits.

The plaintiff attempted to show by the testimony of the witness the value of this mine in 1907 and this was excluded by the court on objection by the defendants because the time was "too remote." Certainly if the same testimony at a nearer date was too remote when offered by the plaintiff, it should have been "too remote" when offered by the defendants.

II.

The next general issue adopted for convenience is as follows:

> "Did the defendant Eugene R. Day, prior to purchasing from plaintiff her interests in the partnership property of the Hercules Mining Company, conceal from her any material facts known to him and obtained by him by reason of the position he occupied as managing partner of said mining enterprise, or did he conceal from her any such material facts so known to him and which information was not known to her and which was necessary to enable her to form a sound judgment as to the value of the Hercules mining property at the time of such sale; and were all such disclosures made prior to such purchase as under the circumstances the law required of said Eugene R. Day to make to the plaintiff prior to the time of the execution of the deed and contract conveying said property to the defendant Eleanor Day Boyce?"

As this is one of the main issues in this suit, we have re-

duced to a narrative form the testimony of Eugene R. Day with reference to what disclosures he made to the plaintiff Mathilda Cardoner prior to the time he purchased her one-sixteenth interest in the Hercules mining properties, which is as follows:

TESTIMONY OF EUGENE R. DAY.

The statements for the year 1916, commencing with January, and for each month including September, were all delivered by me to Mrs. Cardoner. There was a conversation in April, 1916, the very first meeting, relative to the Hercules properties. She wanted to know what about the property. I sat in my inner office and told her the details of the property as nearly as I was able to, commencing with the new mill in Wallace.

I told her that there had been many changes at the Hercules properties since she lived in Burke, that the upper levels of the mine were worked out, that exit to the ore body was gained through a long tunnel, known as the Hummingbird tunnel, by some, and by the Hercules people as No. 5; that this tunnel and property had been acquired very largely from her husband, who was a large stockholder in the Hummingbird property; that it was necessary for the Hercules Company to buy the many houses that stood on this property, so that they could have sufficient room to operate the property, and that those houses had been torn down, and machine shops, blacksmith shops, compressor rooms, and all those necessary buildings for a mine were now occupying that ground that had been purchased from the Hummingbird.

I described the condition of the mines and I told her that it was very largely worked out from the apex to the Hummingbird level, and we were sinking a shaft at that time from the No. 5 level, the Hummingbird level; that was the shaft that proceeded down and cut the vein on the 200, was

cut the ore intersected, but there was not sufficient work done there to tell about the ore bodies at that time, that the shaft was still being sunk, and I think we were nearing or about down to the 400-foot level. I told her that a station had been cut on the 200-foot level, we had drifted over to the vein and into it and intersected good ore in the vein. That shaft starts on the hanging wall side of the vein and penetrates the vein about 410 feet from its collar and goes below the 200-foot level, I don't know just what distance it had gone down at that time. I am not sure whether it had intersected the vein from the hanging wall side of the country rock before that time. It was being sunk, but I don't know just where it was at that time. I told her we had discovered good ore on the 200-foot level, but that we hadn't had time to know how good and how much we had discovered.

She wanted to know all the property interests, because she was coming into it, and she wanted to know all about it. I explained to her that the Hercules Company owned many claims, a great deal of stock in outlying claims, as a protection to the Hercules, that they had very little value, but that they were a protection to the Hercules property.

The Hercules Company itself had purchased mine stocks and smelter stocks. I described those and told her we had purchased a half interest in the Northport Smelting Company at a cost of forty thousand dollars, and three-eighths of the Pennsylvania Smelting Company at a cost of $87,500. I went into the business of the Northport smelter or refinery thoroughly at that time and explained to Mrs. Cardoner the reason why we had gone into the Northport smelter and the refinery—that previous to going into the smelting and refining business we had had a very advantageous contract, that we were no longer able to have that contract renewed, and were without a contract for several months during the summer of 1915. During those months the mine was shut down because we had no place to ship until we got some ar-

rangements made. The advantage, I told her, of having the stock, was simply this, that I considered the business of the partnership in better condition than it ever had been before. That by having a connection with the smelter and the refinery we were able to see the ore from the time it was broken in the mine through all its processes to the market; that we received and would receive all that was in it, the by-products, and that we would get in general everything that there was in the ore. I thought, of course, that it was a good business proposition, and I told her it was. She wanted to know if I really thought it was good business; that there seemed to be so much ore in transit, and she had heard Mr. Cardoner say to keep out of the smelting business, and she wondered if it was good. I told her I certainly believed it was. I explained to her that by having these properties, and by smelting this ore ourselves, it took three months or more to get returns from the ore in the market, because the smelter or the refinery did not have the capital to do for the ore as the East Helena plant, or former shipping place, had, and that we must sell the ore to get the money. I am sure I told her that there was a very large tonnage of ore in transit, and that it would probably amount to eight hundred thousand or a million dollars. Mrs. Cardoner did not think that was a good business proposition to tie up so much money and so much or in the smelting business. She was quite doubtful about it, but I assured her that the business of the partnership was never healthier than it was at that time. She asked me my opinion about the future life of the mine below the Hummingbird tunnel, and I told her that we had always had good ore all the way down, and the history of the country showed that the ore became baser, but I had every reason to believe that large bodies of ore would be discovered in new development by the shaft and below the No. 5 level of the Hercules property—below the No. 5 tunnel. She asked me how deep I supposed it would go, and I told her no one knew that; that the best opinion we could have would be

proved by the example of others who mined in the district close to that particular place. I recited further my idea in the matter, and told her it was my opinion at that time that the Tiger did not pay lower than the fifteen or eighteen hundred feet below the creek level.

I had conversations with Mrs. Cardoner during the summer of 1916, at my office in Wallace. She came to the office sometimes twice between office hours; she also was in my office in the evening. I gave her all the information that I had and that was available of giving, and I have given every Hercules owner every information I have regarding that property. Mrs. Cardoner's calls and visits at my office, as I have witnesses that can porve, lasted from forty-five minutes to two hours and a half. I would say I had at least a dozen conversations with her during the summer of 1916.

She was interested in knowing every detail concerning that business. She wanted to know every particular thing, and did know it, too, as near as I could tell her.

I gave her full information on every subject.

(Testimony of Eugene R. Day, Rec. pp. 720 to 730.)

CROSS EXAMINATION.

The next previous conversation to the one I had with her on the 28th day of October when the deed was signed up was in October, I don't remember exactly the time. I presume some time between the 11th and the 15th. It was with reference to the distribution of the estate. There may have been something said about the Hercules Mine. I won't be positive but the principal subject was the estate. I had so many conversations with Mrs. Cardoner concerning the mine that I can not say. I don't remember the next previous conversation to that. I think probably in August. It may have been two different dates in August, I won't be

positive about it. I know of the times but I can not give the dates. I am not able to say when it was, I can not fix the dates. I think the conversations in August were some little time apart, but she visited the office daily some times when she was in town. The last one in August to which my mind reverts was in my office. I don't recall what time of day it was. She wanted to know the condition of the business always.

Q. Please tell me what you told her at that time in that conversation.

A. I told her in that conversation as I had in all conversations, the condition of the business.

Q. Be kind enough to tell me in some detail what you told her in that conversation.

A. Well, it would be to the same import as the others were, the condition of the mine, the condition of the smelter and refinery.

Q. That is stating the subject to which it refers. I wish you would tell me what you told her on those subjects at that time.

A. I told her the condition of the partnership was never in such good shape as it was at that time, and I told her about the mine, the progress of the mine.

I told her that the mine down from the surface to the Hummingbird Tunnel was nearly worked out, but we were working hard to get new ground open so we could feed the mill sufficient. I told her about the operations; I told her that we cut a big station; that we had increased the size of the mill; that we purchased ground and purchased stocks and mining claims; I told her about the ore in transit. I did not tell her the names of the mining claims; I told her the names of the mining companies in which we had purchased stock. I told her that we bought to protect the Hercules Company's interest. I mentioned the Idaho and

Eastern, the Hummingbird; I mentioned all the conditions; I don't know exactly.

Q. I am not asking about conditions now, I am asking about the companies that you told her in August, you bought stock in.

A. Well, I had told her that in all the conversations. I can not separate one conversation from the others because we went over the same thing each time. I told her all of these stocks were purchased for the protection of the Hercules lode. Also that the Hummingbird stocks were largely purchased for the purpose of getting an exit into the ore body from a depth. I told her about the Northport Smelter, and I told her about the refinery in all of these conversations. I told her that the Northport Smelter enabled us to have an avenue for our products and we were in a position at that time to see the ore all the way from the time it was broken until it was sold. I told her that the refinery was necessary. It was not supplementing the smelter, but acting in conjunction with it in marketing ore. I told her in this August conversation there was always a large amount of ore in transit, that we did not have and the refiner did not have sufficient money to pay for the ore like the East Helena plant has, and of course we couldn't get the money until the ore was sold; therefore it necessitated a large amount of ore always being in transit. I told her of course, that we always kept a large cash reserve in order to protect the business; I told her the exact condition of the shaft as near as I could; I told her that we were sinking the shaft and doing the work as far as possible in order to open up new ore bodies; I told her that our ore was nearly exhausted before and we were hurrying to get this shaft developed; this ore that was off of the shaft, and have more ore so we could continue our operations. In the August conversation, I told her about the ore that was found in the 200 foot level; that we had encountered good ore in the 200 foot level; that

the ore was not explored enough to tell how much there was, but it looked good.

We did strike ore in the 410 feet; we went through the vein at the 410 foot; 410 feet from the collar. I didn't think we had gone through the ore at that time. I don't know whether that was the last conversation I had with her with reference to the mine or not, because I had several conversations with her at that time, and I can not separate them.

Q. I wish you would tell me about when you had the last conversation with her on the subject of the mine. I thought we had excluded all dates subsequent to this in August. If not, I wish you would tell me when you had your last conversation with her on the subject of the mine.

A. Well, it might have been in the latter days of August.

Q. It might have been later?

A. Yes, it could have been later.

Q. Well, how much later, approxmately, please.

A. I won't say how much later because it might have been—we might have talked all over the mine at the time we terminated the administration business.

Q. Will you tell me as nearly as you can the date of the conversation in which you told her about striking that ore in the 410 feet from the collar of the shaft.

A. No, I can not tell you the date.

Q. Can you approximate it within a month?

A. No, I can't.

Q. You did not have that conversation with her on the 14th of October, when she was up there and received from you the money in your hands of the estate?

A. I might have told her then.

Q. Tell us if you did tell her; tell us what you told her then. Did you go into the whole subject of the condition of the mine then?

A. Each time we talked over the business we went over the same subject.

Q. Mr. Day, without stating dates now, as you say you can not do so, when you did tell her about the ore in the 410 foot level of the shaft, you distinctly remember of telling her that don't you?

A. Yes, I told her when we went through there.

Having in memory without reference to the date, I will tell the entire conversation on that occasion. I told her that we encountered ore in the shaft at about 410 feet, or thereabout from its collar. That the shaft had been sunk on the hanging wall side, and when it went through the vein it cut some ore. I told her we had gone through some ore. I told her we had proceeded with the shaft and we were working downward just as far as possible so that we could get some ore opened up. I talked over the same conditions, over and over, what occurred previously, and what was going on there. It was a repetition of the same thing all the time with the future development. I don't know that I can tell the whole conversation at that time. I went over the business with her as I had before. I told her so much about all the mine and its workings and the mill and the smelter and refinery that I can not separate it; this conversation was in my office. I can not separate the time; she had been in my office in the morning; she had been there in the afternoon and in the evening. I told her the same in substance during the summer, every time we talked which must have been a dozen times. I detailed this whole story in April or in the Spring, as I told it on the stand yesterday. I saw her many times during the summer, and each time I told her this whole story over again in general, not exactly, but in general, the same in substance. I related to her the same substance in facts. She asked me many questions. She wanted to know all about the smelter and refinery, if I thought it was good business for us to have gone into them;

this was at the first conversation. In each of the dozen conversations I had with her, she questioned whether or not it was good business to have gone into the smelting business. I told her we were forced to go into the smelting and refining business. That we were unable to have our contracts renewed. That we had to go into the smelting business to get an avenue for our ore to the market. I told her this in all conversations. I don't know how many. She requested me to send no information to her daughter Bertha Pouchet and her son in law about the business, to send no statements to them, to give all information to herself. That was in all conversations, and she repeated it in each one. She asked the same subject matter in each conversation in substance, she asked to be told all about the business, the refinery and the smelter, the ore in transit; she mentioned all of these things in her questions. It all took place in a friendly conversation between Mrs. Cardoner and myself. I don't know as I told her the exact amount of ore in transit. I told her it might mean that we would have eight hundred or a million dollars in transit. I mean eight hundred thousand or a million dollars. She always wanted to know that in each conversation. I answered her in each of the dozen conversations that it would take 90 days to 4 months to get returns back, and of course there was the same approximate tonnage all the time according to the way we were shipping. This I told her in each conversation. She made the statement that she was coming into her husband's property and she wanted to know all about the business, and asked me to tell her generally what I could in reference to it. She might not have said the same thing in each of the dozen conversations but she always talked on the same subject. She asked for the same information in each of the dozen conversations. I reiterated over and over again the same information; I detailed yesterday and this morning. In that first conversation she asked everything that I have

repeated in these conversations, as to whether she asked more I can not say. Having in the April or in the Spring conversation, gone over in great detail as I yesterday testified, I went over it in substantially the same detail I should say a dozen times more during that summer. It might have been more, I can't state exactly. We always talked the details of the business over. In the April conversation I told her we were sinking the shaft and that the shaft had been commenced early this spring and was proceeding downward. I told her the development from time to time as they developed. I went over it with her each time. Mrs. Cardoner wanted the details and I spent some three quarters of an hour to two hours over the details there, and and each of these times, I spent the whole time going over with her these things. I wouldn't say whether we talked over the mining business at the time of the decree of distribution or not. I won't fix any date before that time as the last date on which I told her this story that I have repeated; I can't fix any approximation of the time. I won't say that it was the latter part of September. I won't say when it was. There was too many conversations for me to undertake to say. I don't know whether the last conversation was some time in August or not. In every conversation that I had with her we talked the business over. I don't know how many times she came to Wallace, when we were getting in this dozen conversations. I don't know whether the conversations were bunched in the early spring, she was there very often during the summer time. I don't know just how many times. In the various conversations she discussed the settlement of the estate with me each time. She said many times in reference to it that she wanted to get it settled up and wanted to get the money. That was the main reason for her coming here, to find out about the business and get everything terminated. I don't know that she talked about the settlement of the estate each

time but she did many times.

Mrs. Cardoner did not ask me what the net profits of the business had been up to the dates of the conversation; she had statements from me. I don't know that I did tell her, and I won't say that I did not. I told her what the net profits had aggregated.

Q. What did you tell her that they aggregated?

A. I told her that it had been a nice showing that the mine had always made. I don't know that I told her exactly what it aggregated. I went all over the conditions and she had her statements. They had down what the history of the mine had been. I refer to the statements that have been introduced in evidence. I don't think I told her the aggregate of the dividends during that time. The statements I refer to are those that have been introduced in evidence.

Q. Did you tell her about the aggregate of the dividends for that period of time, which had aggregated $9,981,-527.72; did you tell her the aggregate of those dividends during that time.

A. No, I don't think I did.

The testimony of the plaintiff is to the effect that she obtained no information of any character from Eugene R. Day but that he persistently refused to give such information, though she had requested it of him (Tr. p. 334).

The conditions surrounding the plaintiff were substantially as follows: That she was 64 years old (Tr. p. 319), was ill of asthma (Tr. pp. 312-318), and had been residing in Spain from 1906 until she came to America after her husband's death, arriving in Spokane in April, 1916, (Tr. p. 323); that she was a native of France although she had lived in America for a number of years before going to Spain in 1906 (Tr. p. 323-4); she had lived near the Her-

cules mine from the time it was opened until she went to Spain in 1906, that is, about five years; her husband was a strong, forceful man, attended to his own business and looked after all the mining properties and interests he had in Burke up to the time he left in 1906; (Testimony of Allen, p. 654).

Mrs. Cardoner, according to her own testimony, had been very much alarmed by one Harry Allen who was encouraging her to sell the property; she stated that she was advised if she did not sell she might not get any more dividends and might lose everything; that she might have a lawsuit with the people in Spain (Tr. 340-1); that the Day brothers were bucking the Guggenheims and that they would lose all their money (Tr. p. 335.)

There is sufficient corroboration to this testimony in that of Harry Allen to show that Mrs. Cardoner was alarmed about the value of the property. He testified that she asked him if he thought the smelting business was good (Tr. p. 600), that Major Woods, her old attorney, had advised her to sell (Tr. p. 601); that the smelting business was a new venture, that when they mined their ore they did not know what they would get for it, that they were in competition with the Guggenheims, who were very strong and controlled the price of lead largely in this country (Tr. p. 613); he further stated that the Hercules company were speculating in the lead market for the reason that they were in the smelting business and depending on the market for what they would get for their products; that a remark he made could easily have been construed by her to have menat that the Hercules company were "bucking the Guggenheims and that the Guggenheims had too much money for the Days and they would be smashed" (Tr. p. 614).

From the foregoing testimony it was very evident that from some source or other Mrs. Cardoner had received information that alarmed her about the value of the Hercules

property. This fact is further fortified by the evidence to the effect that she visited Mr. Paulsen, one of the partners, in endeavoring to determine whether or not she should sell her interest (Tr. pp. 683-685) ; Mr. Paulsen did not give her any information as to the value but substantially advised her she would have sufficient money to take care of her if she held the mine or if she sold it; that his interest was not for sale.

She further testifies that she attempted to see Mr. Hutton but never could find him. Mr. Hutton testifies that she did interview him with reference to the mine and that he told her that $4,000,000 was a good price for it (Tr. p. 672.)

Eugene R. Day testified that she came to him more than a dozen times (which she denies) to secure information with reference to the property (Tr. p. 783.)

Thus it will be seen that she was exercised over the mine and its value and was attempting the best she could to determine whether or not she should sell this property, and the condition of her mental attitude was such that she was entitled to and should have had all possible information with reference to the value of the property. That she was a widow, substantially without advisors who had knowledge of mining property, for neither Judge Wood nor Harry Allen claimed to be capable of giving such advice, and evidently was in such condition of mind that might be called "panicky," and would cause her to sacrifice her property unless she was fully advised by the only person who could really give the facts with full knowledge, (Eugene R. Day), as to the real condition of the Hercules mining property.

This suit was tried in the District Court upon the theory that it was a contract made by persons between whom a fiduciary relation existed, and that the case of Brooks v. Martin. 69 U. S. 70, was authority covering cases of this character. (See colloquy between attorneys, Tr. pp. 562-568.)

The proposition of law laid down in Brooks v. Martin, Supra, is adopted by us as our second point, which is as follows:

"If a partner who exclusively superintends the business and accounts of a partnership purchases the share of another partner; in order to sustain such a sale it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all information in possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold was communicated by the former to the latter."

We believe from all the testimony in this case with reference to value that the following are among the most essential facts necessary to determine the value of the mine, stated in their order of importance:

1. The net income year by year, and particularly the present net income.

2. The dividends declared year by year and aggregate.

3. The previous history of the mine and its production.

4. The conditions as they appeared within the mine on the date value is sought to be proven;

5. The history, production and depth of mines of like character in the same locality or district.

Taking all these elements of value, we wish to refer to certain propositions of law. In the case of Brooks v. Martin, 2 Wall. 70, the Supreme Court of the United States had before it a very similar case. A bill was filed in Chancery to set aside a contract by which appellant had sold his interest in a partnership mine. The purchasing partner was the manager of the mine and the other lived at a distance from it. It is unnecessary to go into details of this case. The purchase of the mine was admitted but the fraud was denied, as it was in this case, the appellee claim-

ing that the transaction was in all respects fair and honest. The court said:

> "If the parties are to be regarded in this transaction as holding towards each other no different relations from those which ordinarily attend buyer and seller and is therefore under no special obligation to deal conscientiously with each other we are satisfied that no such fraud is proven as would justify a court in setting aside an executed contract. But there are relations of trust and confidence which one man may occupy towards another, either personally or in regard to particular property which is the subject of contract which imposes upon him a special and peculiar obligation to deal with the other person towards whom he stands so related with a candor and fairness and a refusal to avail himself of any advantage of superior information or other favorable circumstances not required by courts of justice in the usual business transactions of life * * * * *"

Without going further into this case, it was determined that the managing partner bore the same fiduciary relationship towards his copartner as that of cestui que trust, and stated:

> *"We lay down then as applicable to the case before us and to all others of like character, that in order to sustain a sale it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased, and, second, that all the information in possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold should have been communicated by the former to the latter."*

The question under this issue is whether or not Eugene R. Day communicated all the information he had obtained

by reason of his position as general manager of the Hercules Mining Company to Mrs. Cardoner before entering into the contract for the purchase of said property.

The first and most important element in determining value of any property is the net income of such property. All information claimed to have been disclosed by Day to Mrs. Cardoner has been heretofore fully set out in this brief; but as this in our view is the most important element in connection with value, we make reference to this testimony which may be found at page 792 of the record and is as follows:

"Q. Mr. Day, did you tell Mrs. Cardoner what the net profits of the business had been up to the date of the conversation?

"A. She had statements from me and she didn't ask me that.

"Q. Pardon me, did you tell her?

"A. I don't know that I did and I won't say that I did not.

"Q. The net profits as shown by your answer to one of the interrogatories was $11,915,986.74 *up to the* 28*th of October,* 1916, *did you say anything to her about what they aggregated?*

"A. Yes, I said to her what they aggregated.

"Q. What did you tell her they aggregated?

"A. I told her that it had been a nice showing that the mine had always made.

"Q. What did you tell her they had aggregated, if you told her?

"A. I dont know as I told her exactly what it aggregated; I went all over the conditions and she had her statements and they had down what the history of the mine had been.

"Q. The statements that you refer to are those that have been introduced in evidence?

"A. Yes.

Q. Did you tell her about the aggregate of the dividends according to that same answer, the dividends for that period of time which had aggregated $9,981,527.72, *did you tell her the aggregate of these dividends during that time?*

"A. No, I don't think I did."

Then the question is whether or not Mrs. Cardoner had sufficient information from the statements referred to that would advise her as to what the net income of the mine had been. These statements were introduced in evidence and appear as plaintiff's exhibits 2 to 7, and defendant's exhibits 19, 20, 21 and 22; the latter exhibits plaintiff testified she never received. Also the defendant's exhibits Nos. 55, 56, 57, 58, 59 and 60, the last exhibit, No. 60, being a statement for September, 1916, and appearing at pages 1359 to 1367 of the record and would contain as much information as could be obtained practically from all the statements excepting of course the dividends declared each month could be determined by calculation. An analysis of these exhibits shows that the information as to the net income of the mine is not given. About the only substantial testimony with reference to values contained therein is the amount of dividends which were paid up to that time. There is nothing in all these statements to indicate what the net income of the mine had been at any time, and there is no testimony in the record to show that the plaintiff was familiar with the condition of the mines other than the testimony of Eugene R. Day and the fact that she was possessed of these statements. The statements furnished her were only those subsequent to her husband's death, which covered a part of the year 1915 and all of the year of 1916 up to and including the month of September. The September statement shows that the dividends had been $10,379,527.72 but there is nothing in the statement from which it could be determined what the net income had been. For instance, the

statement for January, 1916, (Tr. p. 1153 to 1160) shows the dividends had been $8,979,527.72. By calculation it might be determined from this how much the dividends had been including September, 1916, for the previous nine months $1,400,000. But the testimony of Eugene R. Day, as reflected by his answer to interrogatory No. 14 (Tr. p. 77) shows that up to and including the 28th day of October, 1916, the net profit for the ten months of said year was $2,368,682.90, or approximately a difference of a million dollars between the net income and the dividends during said period. The plaintiff had a right to believe, unless otherwise informed, that the dividends would approximate the earnings of the mine inasmuch as the dividends apparently were paid monthly. During the year of 1915 the net profit of the company was $1,096,019.37 and the dividends were $320,000, making a difference between the net income and the dividends paid of $776,019.37, (Tr. p. 77). These are the only two years that her husband had not managed the mining interests as he died in July, 1915. From these reports it will thus be seen there was absolutely no way of determining the net income of the mine. Of course the fact that she had knowledge of the dividends paid would be of little importance where the dividends were not substantially those of the earnings. She then must have believed that the earnings of the mine in 1915 was not more than $320,000, and in 1916 up to the date of sale was $1,400,000, because no other information, according to the testimony, had ever been given to her. We believe that any person desiring to value the Hercules mining properties would hae been more interested in knowing the net profits immediately preceding the date of purchase than of any other time. The actual production of the mine at the time of the purchase was a great deal more important than previous dividends paid or even the amount of production of previous years. If Mrs. Cardoner had known that instead of $1,-

400,000, as the statement shows dividends were declared that the mine had actually produced in net profits in ten months $2,368,682.90, or for the whole year at the same rate (Eugene R. Day testified that the production for November and December was approximately the same as that of October, (Tr. p. 852), of more than $2,750,000, she would have been an embicile to have made the trade,, especially had she been informed that the probability was the mine would continue to pay for a period of ten years as testified to by Eugene R. Day. (Tr. 762). But the testimony shows that the ore taken out for the months of November and December, 1915, equaled 16,317.50 tons, while for the previous months it equaled to 70,871.61 tons, or 23 per cent of the whole year was taken out in November and December after the sale. This is calculated from plaintiff's exhibit No. 53 appearing at page 1319 of the transcript. The net inome for the year of 1916 would in fact be $3,206,000/based on the amount of production and assuming that the ore extracted in November and December was of equal value to that of the other months. In other words, if she had been informed that the net production from this mine for the year of 1916 would be within $8,00,-000 of the estimated value for which she sold it, she certainly would not have made the trade.

It is well here to state in this brief that the mine and all property connected with it including more than one million dollars in ore already extracted and sold but not paid for, was valued at five million dollars, (See answer of Eugene R. Day to interrogatory No. 17, Tr. p. 78, in which he states that on the 28th day of October, 1916, there had been sold and shipped crude ore and concentrates not paid for and due said company to the amount of $1,048,,864.14.) If this is subtracted from the five million dollars basis upon which the mine was sold it will leave a balance of $3,951,135.86 as basis of value for the Hercules mine, the Northport smelter,

Pennsylvania refinery, the Wallace mills, and all of the properties of that partnership with the exception of the cash in bank, estimated to be $600,000 and of which she was given her one-sixteenth. In other words, the actual net profits of the mine for the one year of 1916 almost equaled the value placed upon the mine when it was purchased. Had this information been given to Mrs. Cardoner by Eugene R. Day no reasonable person believes she would have sold her interest at any such figure

From some reason unexplained, or not sufficiently explained, there was only $320,000 in dividends declared in the year of 1915 when the net earnings were $1,096,019.37 (Tr. p. 77.) Mrs. Cardoner apparently knew of the small dividend but was never advised, according to her testimony, the reason dividends were small during that year (Tr. p. 340.)

2. Another element to determine the value of the mine is the dividends that had been declared. It will be seen from the answer to interrogatory 14 that appears at pages 72 to 77 of the record that the dividends declared approximated the net earnings each year up until the year of 1915, the very year that Madame Cardoner became possessed of the property, and in 1915 the dividends were less than one-third of the net profits, and in 1916 they were a million dollars less than the net profits up to the date of sale. There is no testimony that Mrs. Cardoner had any evidence as to the earlier condition of the mine with the exception of the statements introduced in evidence and heretofore referred to.

3. It will be impossible to quote at large in this argument from the testimony of the witness Eugene R. Day with reference to what information he actually did furnish the plaintiff, but the testimony has already been quoted at large in this brief. We do not hesitate to say that if any person can read over that testimony and determine there-

from any particular judgment as to the value of the Hercules mine he must be a person of more than ordinary intelligence. There is no testimony at all to show any knowledge by Mrs. Cardoner of the previous history of the Hercules mine except the fact that she was furnished the statements heretofore mentioned which showed dividends had been paid approximating $10,380,000 and that she had lived near the mines until 1906. Whether she understood these statements is a disputed question. Certainly there is no direct evidence to prove it and she denies that she did understand them (Tr. p. 420.) There is no testimony given as to the amount of ore taken out, the width and length of the ore bodies above the Hummingbird tunnel, nor in fact anything from which an engineer could determine the quantity of ore that had been removed from the mine. Nor is there any evidence to show that she was advised as to the mineral content of the ore in lead and silver, nor the prices received therefor during its previous history. The statements of Eugene R. Day were general in every particular He attempted to cover the whole ground by stating numerous times "I told her everything," etc., without stating what "everything" was. He said he told her about the mill at Wallace. That is practically all the information before the court as to what was actually said to Mrs. Cardoner about the new mill at Wallace, (Tr. p. 720). He told her that the levels about the Hummingbird tunnel had been practically worked out (Tr. p. 71), which was material information, but he did not tell her the amount of the ore that had been taken out in the aggregate or by years, nor what it was sold for nor the changes in quality. He told her that they were in process of sinking a shaft from the Hummingbird tunnel (Tr. p. 722) and that they were near the 400-foot level. That a station had been cut at the 200-foot and that they were drifting over to the vein and into the vein and had intersected good ore in the vein (Tr. 728) ; this in-

formation was of value but was scarcely practical without some knowledge as to the size of the vein, whether or not the ore was the same quality or better or poorer than that previously mined, and the general showing made at the 200 and 400-foot level. A mere statement that the vein had been struck at the 200-foot level was not sufficient information to base any judgment as to the value of the vein. He explained to her that the Hercules Mining Company owned many mining claims and a great deal of stock as a protection to the Hercules, but they were of very little value. That they had purchased a half interest in the Northport Smelting Company and a three-eights interest in the Pennsylvania Refining Company (Tr. p. 724.) He stated that by having a connection with the smelter and refinery that they were able to see the ore from the time it was broken in the mine through all its process to the market and that they would receive all that was in it (Tr. p. 725), but she was not advised as to the earnings of the Northport smelter and the Pennsylvania refinery, nor how much benefit the stock in these companies would be to the Hercules mine. She was simply told that it was good business. He states that he thought he told her that there was a large tonnage of ore in transit which would probably amount to $800,000 or $1,000,000. He stated that he told her that he believed that large bodies of ore would be discovered in new developments (Tr. p. 727), but he gave no idea about what he meant by large bodies of ore, whether they would be as large as those discovered in the levels above nor what was the size of the ore bodies previously discovered. He says that he told her that the depth of the mine from the best opinion would be proved by the example of other mines in that district close to that particular place. This information was of value but was largely without benefit unless she was told the depth of other mines and the size of the ore bodies that would extend to that depth. On cross examination Mr.

Day's testimony would indicate that Mrs. Cardoner was somewhat of an embecile and that he was a very patient man. This cross examination was extremely interesting. He states many times that he told her "at least a dozen times" over and over again the same facts on each visit she made to his office during the spring and summer of 1916. Every conversation was exactly alike (Tr. p. 774). This whole testimony can be sifted down and practically no real information as to the value of the Hercules mine according to Eugene Day was communicated to Mrs. Cardoner. His statements "I told her about the Northport smelter and the refinery in all these conversations," that the refinery was necessary, was of little worth in determining the real value of the Hercules mine. The fact that he told her they were sinking shafts and had struck the ore at 410 feet below the Hummingbird tunnel (Tr. p. 776) would indicate very little unless there is some further testimony to show the size of these developments. The burden of his testimony was "Well, I talked over the same conditions over and over, what occurred previously, because that was the operation of the mine, just simply told the conditions and what was going on there, and it was a repetition of the same thang all the time with the future deelopment" (Tr. p. 779).

The cross examination showed that the information given Mrs. Cardoner, according to Day's own testimony, was very meager indeed, and his refusal to answer questions, equivocation, and statements that the same particular facts were talked over in each conversation, something extremely unreasonable, does not place it above serious doubt and suspicion.

Eugene R. Day testified that he had not thought of purchasing this property until the 20th of October, just a few days before the trade was closed on the 28th of the same month (Tr. p. 793); he testified that the last conversation he had with Mrs. Cardoner was probably in August (Tr. p.

771.) Later on he stated that he did not know whether it was in August or not (Tr. p. 786). At no time does Eugene R. Day intimate that he advised Mrs. Cardoner with reference to the condition of the mining properties after the 20th of October, on which date he first thought to making the purchase, with a view of enlightening her as to conditions of the property so that she might form a just and reasonable judgment as to its value. *All of the information he claims to have given her was in answer to questions asked him about the property, because as he stated, she had come into the property now and wanted to know the facts about it, and was not made with a view of apprising her of conditions so that her judgment would be safe in making a sale.*

It is quite certain from the evidence that he did not desire her to have the necessary information, for he bargained with her or Allen as though she were a stranger selling her interests. Allen testified that the negotiations were carried on for several days. She was first offered $275,000 for her interest, which included cash on hand for which subsequently she was paid $37,500 (Eugene R. Day's testimony, pp. 736-7). This would be $237,500 for her interest in the mine and the more than a million dollars of ore in transit, or a basis value of $3,800,000 for the mine and ore, and less than $2,800,000 for the mining properties, smelters, accounts, refineries, mills and all other property belonging to the partnership, a sum of money less than the mine actually earned luring the year of 1916, (Tr. pp. 602-605.). Day testified in this regard that in making the trade "I wanted to buy it at as reasonable a price as I could." (Tr. p. 807), that he would have taken it at $275,000.

"Q. That is to say, you were making as good trade with her as you would try to make with me?

"A. I would try to make the best trade I could make.

4. The only practical information given Mrs. Cardoner with reference to the conditions within the mine was that substantially to the effect that the ore bodies had been worked out above the Hummingbird tunnel and that good ore had been struck in the shaft at the 200 and the 410-foot level below the Hummingbird tunnel. There is practically no other information given with reference to the inside of the mine that would be a basis for fixing value. We have already discussed this part of the testimony.

5. The only mine in the district mentioned by Mr. Day, according to his testimony, to Mrs. Cardoner was that of the Tiger, which he says he told her had gone down 1500 to 1800 feet below the creek level (Tr. p. 728.) The testimony shows there were a large number of other mines in that vicinity, some going deeper than the Tiger, as shown by the witness Burbridge at page 919 et seq, to the effect that the Standard Mammoth shaft was sunk 2050 feet, the Hecla was 2200 feet, the Tiger 2200 feet (Day told Mrs. ardoner this mine was only sunk 1500 or 1600 feet.) So that a history of the mining operations in and around the Hercules mine was not imparted to Mrs. Cardoner, though Day's testimony shows that he had been engaged in mining at Burke since 1901.

Where one partner is sole manager of the business he is a trustee for all the others and bound as a trustee in his dealings with the other partners:

McAline v. Miller, 104 Minn. 299 116 NW. 586.

He is a trustee and as such trustee he is bound to the utmost good faith towards his partners, and especially when attempting to purchase an interest.

"There may be such relations between the parties that silence, or the non-disclosure of a material fact, will be fraudulent concealment. If a person standing in a special relation of trust and confidence to another has information concerning property, and contracts with the other, and does

not disclose his exclusive knowledge, the contract may be avoided, or he may be held as a constructive trustee. Thus, if an attorney contracts with his client without disclosing to him material facts in his possession, the contract would be void. The trust and confidence of the client in his attorney is such that an obligation is imposed upon the attorney to communicate every material circumstance of law or fact. Mere silence, under such circumstances, becomes fraudulent concealment. The same rule applies to all contracts of an agent with his principal, principal with his surety, landlord with his tenant, parent with his child, guardian with his ward, ancestor with the heir, husband with his wife, trustee with his *cestui que trust*, executors or administrators with creditors, legatees, or distributees of the estate, *partners with their copartners*, appointors with their appointees, *and part-owners with part-owners;* though the part-owners of a ship, holding by several and independent titles, were held not to stand in such confidential relations to each other that one was under obligation to communicate material facts upon a negotiation to purchase. If any of the parties above named propose to contract with the persons with whom they stand in such relations of trust and confidence, they must use the utmost good faith. It is not enough that they do not affirmatively misreprent: *they must not conceal; they must speak, and speak fully to every material fact known to them*, or the contract will not be allowed to stand. *Thus if a partner who keeps the accounts of the firm should purchase his copartner's interest, without disclosing the state of the accounts, the agreement could not stand.* The same rule applies to family relations in general; as, where a younger brother disputed the legitimacy of his elder brother, and a settlement and partition were entered into, the younger brother having in his possession facts that tended to show that his parents intermarried before the birth of the elder, which facts he did not communicate, the

settlement was set aside. The duty of disclosing facts arises either from a fiduciary relation, or from a trust properly understood to be reposed in one party by another about a matter concerning which the latter has peculiar means of information."

Perry on Trusts, Sec. 178.

"There are also, cases where a party must not be silent upon a material fact within his knowledge, although he stands in no relation of trust and confidence. Thus if a party taking a guaranty from a surety does not disclose facts within his knowledge that enhance the risk, and suffers the surety to bind himself in ignorance of the increased risk, or if a party already defrauded by his clerk should receive security from a third person for such clerk's fidelity, without communicating the fact of the fraud already committed, thus holding the clerk out as trustworthy; in both these and in similar cases the contracts would be void for concealment. Silence as to such facts, under such circumstances, would be equivalent to a positive affirmation that no such facts existed. And so, if a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the relation was confidential, and yet not state material facts, is fraudulent. It is said that a party in such circumstances *is bound to destroy the confidence reposed in him, or to state all the facts which such confidence demands.* He cannot himself contract at arm's length, and permit the other to act as though the relation was one of trust and confidence. And so, if one party knows that the other has fallen into a delusion or mistake as to an article of property, and he does not remove such delusion or mistake, but is silent, and enters into a contract, knowing that the other is contracting under the influnce of

such delusion or mistake, the contract may be set aside; *for, not to remove that delusion or mistake is equivalent to an express misrepresentation.*"

Perry on Trusts, Sec. 109.

"A trustee may buy from the *cestui que trust* provided there is a distinct and clear contract after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee to buy and there is a fair consideration, no fraud, no concealment, no advantage taken by the trustee.

The trustee must clear the transaction of every shadow of suspicion, and if he is an attorney he must show that he gave his client who sold to him full information and disinterested advice. Lord Elden admitted that this exception was a difficult case to make it. And it may be said generally that it is difficult to find a case where such a transaction has been sustained. Any withholding of information, or ignorance of all his rights on the part of the *cestui* or any inadequacy of price will make such a purchaser a constructive trustee.

Perry on Trusts, pp. 318-320, Sec. 195.

Under the above rule, we believe the court must find that the second requirement as laid down in Brooks v. Martin, 2 Wall. 70, to sustain such a contract, to-wit, "That all information in possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold must be communicated by the former to the latter" has not been complied with.

III.

The third finally issue into which we have divided this brief for convenience, is as follows:

"Did the price paid for the appellant's one-sixteenth interest in the Hercules Mining Company property, to-wit, $350,000, approximate reasonably near its value?"

Referring again to the case of Brooks v. Martin Supra: The first condition upon which such contracts are permitted to stand as laid down by rule in that case is "That the price paid approximates reasonably near a fair and adequate consideration for the thing purchased."

It must be borne in mind that the burden of proof in a case of this character is upon the purchaser of the property.

Perry on Trusts, Sec. 194-195-206.

"Where a confidential relation exists between the parties to an agreement it is the duty of the dominant party to make a full and clear statement of all facts which relate to the subject-matter of the contract. Not only this, but such party will be required to fully establish the agreement and remove from it every element of doubt or suspicion that may attach to its execution. The law thus rightfully places the burden upon him of proving the righteousness of his conduct the validity of the contract. The one standing in a confidential relation who conceals or fails to make a full disclosure of facts which are within his knowledge, knowing the other party to be ignorant of those facts, is guilty of fraud both in law and in equity.

Confidential relations have been held to exist between trustee and cestui que trust, principal and agent, attorney and client, physician and patient, husband and wife, parent and child, guardian and ward, partners, clergyman and parishioners, and some others."

Elliott on Contracts, Sec. 74.

The testimony should show under this issue that Eugene R. Day paid approximately near the value of the one-sixteenth interest in the Hercules mine on October 28, 1916, and under the law it is his duty and he is required to fully establish such fact and remove from it every element of doubt or suspicion that may attach to it. (Elliott on contracts, Sec. 74.)

It will be impossible to present in this brief a full state-

ment of all the evidence on the question of value because of its length, but we will state in substance, at least, the evidence as given by the witnesses. First, however, we will state that the property of the Hercules Company (not a part of the mine proper) and its original cost approximating a million dollars is set out in the answers of Eugene R. Day to interrogatories 19, 20 and 21, appearing on pages 75 to 91 of the record, and is substantially as follows:

Land (Exhibit 60, Tr. p. 1365)	$ 14,500.00
Timber Land	4,250.65
Hidden Treasure Mine	392.00
Idaho Eastern Mining and Milling Co.	25,206.39
Hummingbird Mining Co.	207,272.43
Abergris Mining Co.	34,019.51
Basin Mining Co.	22,662.65
Press Times Publishing Co.	1,000.00
Northport Smelting & Refining Co.	288,289.70
Pennsylvania Smelting Co.	87,500.00
Wallace mill	150,891.09
Dwellings	11,403.63
Power line	26,180.39
Sundry Investments	29,400.67
Republic mines	46,500.00
Making a total of	$949,469.11

This does not take into account any of the improvements around the mine nor a large number of assets apparently listed in the statements as shown by exihibit 60 at page 1365-6-7, such as $25,000 loaned Pennsylvania smelter, a saw mill, compressor, Burke power, Tiger Hotel Company of $13,062.32 and other property. There is absolutely no testimony as to the real value of any of the above property except that Eugene R. Day testified substantially that it was only valuable in connection with the Hercules Mining Company interests, although the Northport smelter and

Pennsylvania refinery were engaged in the smelting and refining business by making charges like any corporation of its character. Mr. Day further testified that better rates were obtained by the mining company on account of their interests in the smelter and refinery but no indication was given as to what these better rates were, or their value to the Hercules company.

TESTIMONY OF EUGENE R. DAY

We cut across at the 200-foot level, we struck the vein at 40 or so feet. The vein was dipping towards the shaft about as usual. About 400 feet from the collar we went through the ore; it was not a new shoot. We went through it to the foot wall side; the shaft we was driving was 10x30 feet. I didn't know the width of the ore body; we hadn't opened it up sufficiently to tell but it was about 10 to 12 or 14 feet; the vein doesn't run uniform. We didn't measure it, I could see it was substantially the same but there was always decrease in silver and a raise in iron values as the ore bodies go down. It always amounts to a great deal. I didn't sample it. I didn't figure the amount of ore between the No. 5 level and where we cut the vein at 400 feet in the shaft. I figured in the life of the mine the property had produced ten million dollars in dividends, or thereabouts. I didn't figure how much ore there was from the 400 level in the shaft the balance of the 1100 feet. My general notion was as depth was obtained the iron contents and zinc contents would cut out the silver and lead, that the vein would become barren largely as depth was attained. I couldn't say whether the area of ground 200 feet below No. 5 would produce about the same as the area of ground for 200 feet above No. 5; I didn't know how far the ore bodies would go down. I figured that the ore bodies would be the same. There were three ore chutes at the No. 5 level. I figured as a mining proposition that I could see enough in sight to

get my money out and protect the interests which we already had in the property. I figured that three-fifths of the mine above the Hummingbird tunnel was about exhausted, that two-fifths remained and in the same proportion if everything was as usual that would produce two-fifths of ten million dollars if it would go down 1500 feet on three chutes.

Discovery was up on the hill above the No. 1 tunnel 2250 feet above No. 5 level. We had stoped at 2250 feet. In the beginning the ore bodies were short and narrow, I don't know their width but they were reasonably wide. I won't give the width because I don't remember exactly. The length was perhaps 250 feet or thereabouts; I don't know the total length of ore in the upper workings or any level. We may have had more than one chute. I knew at the time. The ore bodies were somewhat longer in places as we came down and some places were not. I don't know the length of the ore bodies or at No. 5 at the west end of the west chute to east end of the east chute. There are three chutes there, two extremely small, and I can not give the length of any of them. They were longer but very much narrower than No. 1. I was frequently near when they were mining and stoping. It was electrically lighted. I saw the work going on but can not tell how wide the ore was, or approximately. It varied. It is in and out. I am not going to give any approximation. Unless I know what it is I am not going to approximate. I am not going to give something that I can not say is correct. I don't know exactly how long the west ore chute on No. 5 was. It was approximately 600 feet long. I don't know and I can not approximate the length of the central ore chute on No. 5. I knew general conditions on the 28th of October, 1916. I can not give the length of the central ore chute on that time. The east ore chute on the No. 5 was possibly 160 feet long. The west ore chute, that is the larger ore chute, the one that the history

of the mine was made on, goes clear up; that is the one we started on. I call it the big ore chute. The east ore chute went up some distance, I can not say exactly. On th 28th of October we were stoping within the limits of these three intermediate levels above the No. 5 450 feet. For more than a year we had been stoping between the 800 foot level and the No. 5. All the ore mined during the ten months of 1916 came from between the No. 5 and these three levels. We had been stoping there for several years between the No. 5 and 8. The bulk of the ore for several years had come from there. Very little of it had come from above No. 8. I would say for several years, I won't say for what years. I approximate it as four or six years. We were not ready to stope on the 400 foot level on the 28th of October. At the 200 foot level in the shaft we had proceeded on the vein just as fast as we could, but it is impossible for a man to say how far. We had gone through several hundred feet of good ore.

Q. Just as good ore as you had on 5?

A. I am not going to say it was, Mr. Graves, it was good ore.

We hadn't drifted at the 400 foot level. We were just cutting the station. The ore there had a good width. I don't know how wide it was. I can not give you the width of the ore. It was the usual width, however, going down there, just kept the same there as near as I could say. The mine was shut down about three months in 1915 because our contract with the Helena smelter had expired. On this account and on account of the purchase of the Pennsylvania and the Northport plant the net profits fell off below what they were in 1914 and 1916. On the 20th of October, 1916, I believed that the ore body I would strike at the 200 level in the shaft would be substantially as I found it when I did strike it and when I drifted on it. I believe that we would always get good ore in the shaft. At the 400 level I found

it about the same except that I knew all the time it was losing its silver content, that the iron was coming up. I expected to find that the ore would go on down about as I have indicated all the time. It was a speculative proposition, none of us knew, of course. None of us took professional advice about the condition of our business. I took a miner's and a prospector's chance. The statement of the bookkeeper that the month of November production was 200 tons less than October and the month of December was 300 tons more than the month of October showing monthly shipments is I think correct. On October 28 all the ore above the No. 5 level had been blocked out and in sigs. There hasn't been any considerable tonnage going out of there for some time; nearly all the tonnage is coming from below. Our tonnage increased from October 28, 1916, to October 28, 1917. There is a sign of their falling off now. There are indications.

Q. Have you gone since the 28th of October, 1916, far enough on your drifts on the 400 foot level to say whether bodies are as they were above the No. 5?

A. We have.

Q. Have you demonstrated that your judgment was right about that?

A. I am pretty sure it is.

(His judgment, as he testified to as hereinbefore set out, was that the ore bodies would continue down about as usual except a falling off of silver content and an increase in iron.)

In 1906 I think we were working on No. 3 tunnel, about 450 feet below No. 1. In 1905 we were working all the way down from No. 1, 2 to 3. Some of them had been exhausted in 1905. The Northport smelter was built as a custom smelter and the owners went broke, and the Pennsylvania refinery was built as a customs refinery. The in-

terest of the Hercules in the refinery is three-eights. We hav spent considerable money in repairing it. The Northport smelter bought a mine after we bought it; I think $40,000 was paid for it. It was acquired not long after we got the smelter. The smelter makes a regular customs charge. It is better than the customary charge that we would have been able to contract with other people for. We deal exclusively with the smelter and they transact their business with the refinery. I understand we get better arrangment with the refinery than we would have been able to have gotten with a customs refinery. The Northport smelter accounts to us for the ore. We return more money to the Hercules than we would by selling elsewhere. In breaking down the ore there is considerable waste rock. Usually if we ship 10 to 14 cars of ore we would ship a couple of waste. All the waste does not go out; we use it wherever we can for filling purposes.

(Mr. Folsom, a witness, here states that an option for $6,000,000.00 in 1906 covering the Hercules Co. property, was given on the 3rd or 4th of August good for 60 days.)

(Testimony of Eugene R. Day, Tr. 811-867.)

REDIRECT EXAMINATION

The big ore chute was about 600 feet long, I call the other two the east ore chutes. One was a little one, the far chute, was about 125 to 150 feet, the far east, and the middle ore chute about 250 feet long I think, I am not sure now. We didn't encounter the east ore chute on the 200 foot level; it seems to have quit before it came down. The west ore chute shortened up about 125 feet. It shows a continuous shortening up, I think it is about 125 feet shorter on the 600 level than it was on No. 5 tunnel. The eastern ore chute is gone. The indications are the middle ore chute is going to rake into the big one, come together, intersect. The

ore chutes do not seem to be narrowing, they are shortening though. The ore is continuously baser as we go down, the silver values are lower considerably all the time and the lead is a shade lower; we are not troubled so much with zinc, it is mostly iron that bothers us. We are sinking a perpendicular shaft in the country rock. I don't think the property would have such a bright looking future as if the indications of shortening the veins and baser ore weren't there. It don't look so bright as it did on the 28th of October. I can't say the degree it would look darker. With the knowledge I have now I would debate very seriously over buying it.

Q. I imagine you would be glad to get your money out of it, wouldn't you, that you put into it with interest?

A. There were different reasons why I put my money into it; I am perfectly willing to stand by any trade I ever made. (Tr. pp. 867-870.)

TESTIMONY OF MYRON A. FOLSOM.

This witness testified that Frank M. Rothrock and others executed an option in 1905 for six months for his one-thirty second interest in the Hercules mine on the basis of $4,000,000, supposed to cover all the physical properties of the company, and at the same time the Day family and Damian Cardoner gave an option on the same basis.

In 1906, about the first of August, all the owners of the Hercules mine gave an option to J. P. Graves agreeing to convey the Hercules property for $6,000,000 in cash, $20,000 being paid down and forfeited. (Tr. pp. 885 to 887.)

TESTIMONY OF FREDERICK BURBIDGE.

I have been a mining engineer, managing mines mostly, for twenty or twenty-five years. I know the Hercules mine. I have made an estimate of its value as of the 28th day of

October, 1916. I included all the property of the company, that is, I mean cash on hand and ore in transit. My knowledge was obtained from data placed in the answers to the interrogatories that were propounded by the plaintiff in this case and the maps which show the location of the claims. I also made a physical examination of the property. The answer to the interrogatories gave the character of the past production of the mine, the tonnage, the grade, the amount of money received for it, the cost of extraction, the profit derived from the operation of the mine during the period of years from the beginning of operations to October 28, 1916. The question of determining the value of the mine depends upon how much ore there may be in the mine at that date and the assumption as to its like tenor and like value.

I have investigated for the purpose of forming a judgment. There is ore at the bottom of the mine and I know it goes deeper but how much deeper is not absolutely known, but we may form a certain conclusion as to its approximate depth from the depth of other mines in the vicinity. I made a physical examination ten days ago. I was there just one day. I examined three levels on which they were working, entering the stopes below the No. 5 tunnel.

Q. Did you make a careful, exhaustive examination and survey or anything of that sort?

A. No.

Q. Did you sample it?

A. No.

Q. Well, what did you do to examine it?

A. Just to see if there was ore there.

Q. Just walked through?

A. Yes, the history or record of production of the mine, or the grade of ore that has been produced is much more informing than the samples that may be taken from the

face of the ore exposed. I didn't go above the No. 5.

The court: I think I shall let him answer. It may or may not be of much weight; we will see when we get through.

Q. You may answer, Mr. Burbidge, what was your estimate of the value on the 28th of October, and then you may state to the court your reasons.

A. I arrived at an estimated value of the property as of October 28, 1916, of $6,175,585.00.

In estimating the value I made a separate calculation of the value of the ore, then added the cash and the ore that is in transit; I did not include the Northport smelter or the refinery at Pittsburgh or anything of that sort. This estimate relates simply to the mine. It includes everything that they owned, but what Mr. Graves asked me about the smelter and refinery, I considered them, they are an adjunct of the mine, part of the mine. When the mine is through these plants will be useless. They will have nothing but a junk value.

The value of the Hercules mine depends, of course, upon the depth to which it may profitably worked. In estimating the depth we were controlled by the data available concerning other mines in the vicinity. The Tiger ceased to be profitable at what corresponds to 1900 feet below Hercules No. 5 tunnel; the Standard at 1650; the Frisco at 1500. The conclusion is therefore forced that the Hercules is not likely to be profitable at a greater depth than 1900 feet below No. 5 tunnel.

There has been a fairly constant decrease in the silver content of the ore from 1.25 oz. to each unit of lead in the upper working to .8 oz. to the unit at present. This is likely to continue, it being characteristic of the mines of the district.

As greater depth is obtained and the workings approach

the lower horizon of the Burke quartzite the ores become more zincy, the zinc to a considerable extent displacing lead. While the zinc has some value it is much less than the value of the lead it displaces.

These factors must all be taken into account when estimating the value of the mine.

From the beginning of operations at the mine down to October 28th, 1916, the total amount of ore mined was 1,777,591 tons. At that date there was ore remaining above No. 5 tunnel of an average depth of approximately 50 feet. The depth of the mine down to No. 5 tunnel is 2250 feet. There had therefore been worked out 2200 feet, and there remained 1950 feet to be mined down to 1900 feet below No. 5 tunnel, the estimated limit of profitable operations.

Assuming an equal productiveness for the remaining workable ground we get

$$\frac{1777591 \times 1950}{2200} = 1575600 \text{ tons}$$

as the probable tonnage remaining in the mine as of October 28th, 1916.

From January 1st, 1907, to October 28th, 1916, a period of 9 years and 10 months, there was mined 1,650,849 tons of ore; an average of 167,888 tons per year. At the same rate of extraction the 1,575,600 tons in the mine, as of October 28, 1916, would last say 9.4 years.

The profit realized during the period 1907-1916 averaged $5.88 per ton, and the operating cost averaged $4.59.

In the five years 1908-1912 inclusive, the profit per ton of ore mined averaged $3.37.

Mr. Graves: What was that last period you gave?

A. 1908 to 1912. This was a period of normal prices for both lead and silver, and labor and other operating conditions were also normal.

It was difficult to estimate the probable profit to be

realized on the ore yet to be mined, for many variable factors entered into the calculation. The period 1907-1916 included two boom periods, when the price of lead was higher than normal. On the other hand the cost of production was greater. In 1910, the first year in which operations were on present scale, the cost was $2.71 per ton of ore mined, and in 1916 it had grown to $5.25, an increase of over 90 per cent. The operation of the mine was just about to begin through the shaft; which would add 25c per ton to the cost.

This country had not then entered the war. But it was even then a matter of general belief that after the war ends there will be a long period of business depression, which will necessarily mean low prices for lead and silver.

Taking all these things into consideration, as well as the decreasing silver content and the increase of zinc, it was only possible to estimate the profit to be made on the remaining ore at from $2.50 to $3.00 per ton.

Taking the estimated tonnage at the latter value we have 1,575,600 tons at $3.00, $4,726,800; adding cash on hand, $649,359. The ore in transit, $1,048,864; and accounts collectible, $29,400; total $6,454,423. After deducting amount due to Northport smelter, $278,838, leaving an estimated value of $6,175,585 for the Hercules property as of October 28, 1916.

Q. Mr. Burbidge, how did you arrive at your estimated depth of the mine below the Hummingbird tunnel?

A. By assuming that it would go as deep as the neighboring mine, the Tiger.

Q. How deep does that go?

A. It was sunk to a depth of 2200 feet, but it was not profitably operated below.

The valuation includes the mine, ore in transit and accounts collectible. I did not take into consideration the Northport smelter and Pittsburg refinery as an asset.

They had no realizable value because at the end of operations of the mine they will be valueless; part of the machinery may be sold for 10 or 15 or 20 per cent of its cost but this is all that can be sold, and the same is true of the smelter. The original investment in the smelter was half a million dollars, and as testified here, it was bought for $80,000. I gave no value to the mining stocks because there is no known value, they are purely speculative. One sixteenth of the total value is $385,974. The payment of this sum in dividends spread equally over a period of 9.4 years is equivalent to the payment of the whole sum at the end of 4.7 years. The present value is the sum which at compound interest would amount to $385,974 in 4.7 years. On a six per cent basis it would be $293,405.

Q. That is based upon a lump payment of the sum of the whole purchase price at once, is it, Mr. Burbidge?

A. Yes, that is discounted.

The court: I think we understand that. That is the present value?

A. Yes, sir.

CROSS EXAMINATION

The present value is the present value on October 28, 1916, from a sum payable over a certain period of years. When I say the present value I don't mean the value today, if I had discounted the $6,175,000 and divided by sixteen you would have had what you are seeking, it would be $5,694,480; that is the present value of the sum of $6,175,585 distributed over 9.4 years.

Q. There was $1,048,864 of ore in transit. That was equivalent to cash?

A. No, it was not, pardon me. Ore will always be in transit as long as the mine is in operation.

That particular lot of ore will be settled for but other ore

will always be in transit. The cash that was on hand ($649,359) whether that is larger than the usual balance or not I don't know but I do know that a mine operating as that does on such a large scale must necessarily carry a considerable cash balance. In arriving at the cash value have got to assume that the ore that was then outstanding and in transit has got to be distributed over 9 years, or the period I assume for the life of the mine, and I say the same thing about the cash on hand. Toward the end of the operation it would require less perhaps to carry them along. The amount of ore in transit would get less but in the main it will be nine years before the amount of ore that is in transit is capable of distribution to the owners. I got the information that there was 50 feet of ore above the No. 5 tunnel from Mr. Day and the foreman. It was in the stopes above the No. 5 tunnel. There were three chutes of ore and they gave me the intimation it was the equivalent of a depth of 50 feet in these chutes. These chutes were in the aggregate of between nine hundred and a thousand feet long. The main chute had a width of from 12 to 15 feet, what they call the middle chute has a width of about five feet and the east 3 1-2 or 4 feet. This was given me my Mr. Welch, the foreman. My method did not require the estimate of the width, it was strictly one of proportion on the assumption that the remainder of the mine would produce ore of like value to the proportion already worked. In estimating what was left I considered 50 feet above No. 5 and assumed then a solid plane of ore on down 1950 feet. I had the facts as to the ore before already worked out, and it was on this basis that I calculated or estimated the output of the remainder of the mine. I assumed that this ore in going down this 1900 feet went down at the average width and average length that it was in the fifty feet. I calculated the tonnage in the 50 feet. It would take me ten minutes. I assumed that below it would be of like productiveness to

the area stoped above. tI was simply a question of yield per foot of vertical depth. I made no estimate of the tonnage at the 200 below No. 5 and then another 200. I don't have the average profit for the year of 1916. I have for a period. I didn't work out any year. For 1916 would be a little over $9 a ton. For 1915 a little less than $5 and for 1914 between $8 and 9; 1913 about $8, and 1912 a little less than $4. Roughly the tonnage in the 50 foot depth above the No. 5 level was 60,000 tons, counting 9 cubic feet to the ton, I give a width of 15 feet for the main ore shaft, 5 feet for the middle one and 4 feet for the eastern one. I saw stopes and the drifts below No. 5 at the 200 and 400. They were working to the east and west limits of ore bodies on these drifts; they had reached the limits of the ore bodies. I found a shortening of about 100 feet in the western ore chute on the 200 level and on the 400 level the easterly chute didn't appear at all. It appears to have cut out somewhere between 200 and 400. On the sixth the drift had not yet penetrated the full extent of the ore, it was still in ore. The main chute has an average width of approximately 15 feet on the two hundred; below the two hundred, on the four and six hundred it is not quite so wide, it is about 12 feet; I estimated it, measured it with the eye. I took no measurements while I was there. The ore that came out in November and December, 1916, and January and February of 1917 possibly worked a little greater profit than $9 per ton. I know the price of lead was higher and silver was somewhat higher. It cost about 25c per ton more through the shaft to take out the ore than it did through the tunnel.

The Standard Mammoth was worked 2025 feet, the Hecla 1600 feet, the Frisco 2200 feet. In taking 1900 feet, that is the depth at which the Tiger mine which is the nearest operating mine to the Hercules, ceased to be profitable; it was sunk to 2200 feet but was not profitable at that depth.

I did not assume any length or width in the vein. I as-

sumed a uniform production per foot of depth below the No. 5 tunnel as had been obtained above. If you get 100,000 tons of ore out of 100 feet, it is a 1000 tons per foot. (Tr. 889-921.)

REDIRECT EXAMINATION.

Abnormal prices have ruled for lead in the last two or three years. The normal price of lead over a period of over 30 years is $4.32 1-2. In 1916 the price was $6.83. That is the reason the profits in 1916 were so large. Also under the stimulus of that high price the mine had exerted every effort to increase its output and had produced larger tonnage. The cost of production in 1916 increased 90 per cent. over 1910, and today there is still further increase. The price of lead is now $6.25 per cwt. as compared to $6.83 last year. With the increased cost of production none of the mines of the Couer d'Alene district today are any better off, if as well off, as they would be under normal conditions with lead at $4.25. I went down to the 600 level and made a sketch of the ore production of the level from the 500 down. The sketch is marked defendant's exhibit 54. The length of that stope on the No. 5 tunnel is 600 feet. On the 200 level it is only 500 feet. On the 400 and the 600 it is also—on the 400 it is shorter. On the 600 the drift has not yet reached the end of it, but it is so near to it, that we are safe in assuming that it will be the same length, 500 feet. The middle stope has a length of about 225 feet. I should go back for a minute to the west shoot and point out that it has a very strong rake to the east, in this direction. The middle stope or shoot comes down almost vertically without any particular rake. What it has is slightly to the west. It is quite evident that at some step very little below the 600 level it will merge in the west stope. The east stope has a length of 150 feet. It shows the same length on the 200 level. It does not appear at all on the 400 level. It is cut

out or merged in this middle stope. And there is very little doubt that the middle stope will also be cut off or merged in the same stope, and that below a depth of about 800 feet, there will be but the one shoot of ore, the west shoot. That will be approximately 500.

Q. On this west stope, where you say in 800 feet they will merge and be one stope there—will you kindly take the length of it as it appears on the No. 6, and give us the tonnage on a 50-foot width or depth of it. I wish that for comparison with the 50-feet as on the No. 5 tunnel level.

A. That would give a tonnage of 33,333.

The ore chute at the 600 averages 12 feet in width as compared to 15 feet on the No. 5 tunnel level. I have the authority of Mr. Hoover's Principles of Mining as authority for writing off the equipment expenditure, etc. He says "Equipment expenditure, however, presents an annual difficulty, for, as said, the distribution of this item is a factor in the life of the mine, and that is unknown. If such a plant has been paid for out of the earnings, there is no object in carrying it on the company's books as an asset, and most well conducted companies write it off at once."

He is also authority upon the subject of estimating the depth of mines as compared with the depths of other mines. He says: "Mines of a district are usually found under the same geological conditions, and follow somewhat the same habits as to extension in depth or laterally, and especially similar conduct of ore bodies and ore shoots. As a practical criterion one of the most intimate guides is the actual development of adjoining mines."

This is recognized authority. Mr. Hoover is recognized as one of the bright particular stars of the mining profession. He is the man who is starving us; he is the man who is Hooverizing us.

(Tr. pp. 922-927.)

(Here follows testimony with reference to a sketch which

is not before the writer of this brief, and is not referred to further.)

I assume they will extract so many tons of ore per year in the future. Let us suppose they had worked out a thousand feet in depth in the mine and had produced a hundred thousand tons of ore, that would be one hundred tons for each foot.

Most ore bodies are lens shaped, of course, not round, necessarily, but irregularly lens shape. There must necessarily be some horizon where the ore shoot is longer than on others, and there must also be, somewhere about that and somewhere below it, horizons where it is shorter. All ore shoots in their depths peter out gradually, unless they are cut off by a fault. This one, unless it is cut off by a fault, will peter out bit by bit, so that at the depth assumed it will be very much smaller than it is on the—I mean to say that on the doctrine of probalities the yield per foot of depth will be the same below as it has been above. In arriving at my figures I take the average profit from 1908 to 1912, because that period was a normal period, and I omitted 1906 and 1907 because they were boom years, and I omitted 1913, 1914, 1915 and 1916 because they were boom years. *I have the average profit for the ten years preceding October* 28, 1916, *that is*, 1906 to 1916, *eleven years, the average was* $6.04. *To assume that fact the effect would be to necessarily increase it. It would practically double the value. The average profit for the whole life of the mine up to October* 28, 1916, *is* $6.70.

I would like to attach an explanation to that, that in the first few years there was nothing shipped but sorted crude, crude ore, having a value of $50 or $60 a ton. There was mined at that time a considerable tonnage of lower grade ore, the milling ore, but there was no mill on the property, and that ore was simply kept in the mine or on the dump, awaiting the milling facilities. The showing of profits

there, therefore, applies to a tonnage smaller than was actually mined.

That is the reason I would exclude those years. By normal conditions I mean average conditions, conditions as they existed before 1912 and 1913. I am assuming that the price of ore is going down again, going to return to that price; it has already started down. An engineer figuring on the value of a mine would be a very unsafe man to follow if he estimated the value of the ore to be produced over a period of years upon a temporary boom price. I should have measured up the width of the stopes. That is about the only thing which I would do which I did not do in this particular case, and the reason I did not do it in this case, is that my view of the correct method of determining the value was to assume a like production for the future of the mine to its past.

Q. Outside of measuring the stopes that you saw there, did you mean to tell us that you would advise either a sale or a purchase, according to your client's side of the question, upon these figures that you have given, and upon the investigation you have made, and the attention you have given to the subject?

A. I should necessarily verify all the statements made to me as to production.

Q. Yes, I know, but assuming the correctness of the answers to the interrogatories?

A. With that statement, that the data that I used was correct as furnished to me, I should make no change in my estimate of its value.

TESTIMONY OF HARRY L. DAY

The witness testified to a life in the mining business (Tr. p. 970 et seq.) and gave to some extent the history of the Hercules mine, and as follows:

In June, 1901, we struck the ore in the No. 2 level. *It was fine ore; it was the nicest ore that had ever been found in the Couer d'Alene up to that time, high grade carbonates and galena carrying good values in silver.* I was superintendent until the latter part of June, 1912, a period of ten or eleven years. I originated the method of accounting and installed it, you might say, with the accountants, giving a monthly statement to everybody. I kept up an interest in the property. In my judgment and in my belief based on my knowledge of the mine and of business conditions and of general conditions prevailing at that time, I believe that the price paid was a very large price. I felt so at the time, and in fact was very reluctant to go in on the deal, and as a straight proposition I wouldn't go in on the deal, but there were other conditions that influenced me. The scope of our business had extended into the smelting and refining end of it, with attendant complications, and I considered it advisable that the interests of the property should remain intact as far as possible. This was not our first venture in the smelting business. We had been part owners in the Selby smelter some years before, and owned a considerable interest, and without any warning and against a gentleman's agreement with the other owners and stockholders, they sold out to the Guggenheims practically over night, and we were obliged to sell too; that is, in that sense of the word, that we did not care to remain with less than a ten per cent interest, with such powerful people in control of ninety per cent. We made a strenuous fight to stop the sale, but we could not accomplish it. Mr. Folsom and I went down there as soon as we got word. And we finally concluded to sell and take our profits. We made a good profit on it.

And there was another idea in my mind, too, and that was more or less of a sentimental one. The Hercules was our child, our career. It had been a family affair from the very beginning, and we were all very proud of its prosperity, and

our partners were very agreeable, and it occupied a position, I think, unique in the records of mining, and it had been prospected, developed, operated and handled as a mining, milling, smelting and refining proposition by the people who had originally located it, and their associates. And there was a certain feeling with me in regard to the property of staying with it until it was worked out. That had always been our idea, that we were not stock jobbers or speculators. The property had never been incorporated or stocked, and we only expected to get our money back out of the ground and we had no other idea in sight. So that I considered that under all the circumstances that the price paid was a large price. And I considered also other conditions. A certainty, the practical certainty of the enactment of workmen's compensation legislation, which would add a certain amount of charge to the operations of the mine. The fact that a gigantic world war was on, raging in three continents, and the absolute certainty or moral certainty that this country would sooner or later be drawn into it, and with its attendant obligations and also that physically the proposition that the butt end of the mine was behind us. We had mined out more than 2,000 feet of the stoping ground, and experience in the district showed that very few of the mines in the district went down over 3,000 feet, or as low as that. That we were at a critical period of the mine's operation in that we were leaving the hill diggings, the tunnel works, and taking up shaft work, with its attendant complications and expense. There were also some other matters which influenced me in the way of my previous experience in the property, the possibility of a reoccurrence of a porphyry dike, which showed very distinctly in the upper workings, No. 1, No. 2 and No. 3, and which was also a source of apprehension to us as tending to cut off the ore. This porphyry dike was secured into that property. It is a calcareous rock, or bird's-eye porphyry, as it is called by the miners. I always

had in mind, of course, the natural tendency and the natural history of the ore bodies in the district to get baser with depth. The life of a mine, of course, can be described by a crescent or semi-circle, it has its infancy or location, its youth, or period development, its adolescence or its period of extraction, which is followed by a gradual decline practically in the same ratio. The ore bodies shorten up, they get narrower, they get baser, or the values diminish and the property gets poorer with depth. And this scale of operation extends to all the factors in the property. You get less mill dirt, to the mill, you get less ore in transit to the smelter, you get less cash on hand, till the property dies a natural death. You have nothing left but your plant equipment, which is valuable only for what salvage can be gotten out of it. I have particularly in mind a property which I had to do with during my experience with the Federal, the Frisco property, which was worked more or less continually for a period of about twenty years or more, and which was left with a large milling, hoisting and pumping and steam plant, and the Federal people were only able to get for all of this machinery and equipment on the surface one hundred and fifty thousand dollars, including a valuable water right. The Tiger property at Burke, the nearest developed property, had been mined 2,200 feet below the collar of the shaft, and had only paid about 1,800 feet below. It had also been left with a large mining and milling equipment, and some of that had been saved by transferring it to the other properties of the Federal company, but the most of it was worthless, and they finally dismantled it and pulled it down after paying insurance and taxes on it for ten or twelve years. The Marsh property, which was just across the gulch from the portal of the Hercules No. 5, was mined more or less, and I think it was down at that time about 900 feet below the collar of the shaft. I looked at it one time on behalf of the Federal, and found that the ore shoot had raked within the ledge some-

what to the west, and a considerable portion of it then within Federal ground. Some litigation was then contemplated. In fact, we served notice on the Marsh that they were within Federal ground, and that they proceeded at their own risk. Litigation was avoided by a consolidation which was affected after my time, but the Marsh time has spent three-quarters of a million or a million dollars, and had got back four hundred thousand. Their operation was attended with a large loss.

A. Well, it is the nearest property to the Hercules, recently developed; that is, young property. The Hercules is in that neighborhood. And further down the gulch the Standard-Mammoth shaft and workings, and still lower down the gulch the Black Bear, Frisco and Gem. The Gem had rich ore in the upper levels, the finest ore in the country at that time. It only went down 400 or 450 feet below the collar of the shaft. And the Frisco went down about 1,600 feet, but it did not pay all of that distance. The Black Bear was an easterly extension of the Frisco, and afterwards consolidated with it, was mined in the early days on the tunnel level, but without any appreciable amount of profit that I remember. It was so long ago that it was abandoned and shut down, but I think there was a small shaft put down there, but it did not amount to much. I think that covers about all the properties on the canyon in the immediate vicinity. The Standard and the Mammoth combination or consolidation was the largest operating property there, and in considering the possible limits of depth of the Hercules I compared it with that, to some extent.

CROSS EXAMINATION.

Q. At the time that you joined your brother Eugene in taking up this option, and likewise previously, when he first mentioned it to you, you knew that he had been administrator of the estate of Damian Cardoner, deceased?

A. I did.

Q. And I assume you did not know the date of his final discharge?

A. No, I did not; I did not pay any attention to it, except in a general way. Mrs. Cardoner had brought it to my attention once, and possibly twice.

Q. And you knew, of course, of Mr. Cardoner's relations to the property in his lifetime?

A. Very intimately indeed.

Q. And her having obtained that property by descent from her husband?

A. Yes, I knew it as a matter of public knowledge.

Q. I suppose you knew about your brother's relation to the property as partner and at that time manager?

A. Certainly. He had always been partner, and he had been manager for—well, about six years, I think—no, not quite that long.

Q. Whatever it was, you knew about it?

A. Yes.

I don't believe there is any human being can fix the value of property that is out of sight in a fissure in the earth. I always depend on my own experience myself. *The value is best reached by one who is personally and best familiar with the operations, the previous operations of the particular mine, and I think by one who is acquainted with the mines and mining operations of other mines in the neighborhood. He wants to know what he is doing.* I have known some mining engineers right in this country, three of them, good men, to get as wide apart as the poles. *It can best be determined by men who understand the business, of necessity, and the greater familiarity one has with a particular district the better position he is in to express an opinion and form a judgment.* I am familiar with the Hecla in a general way; haven't been in the Hecla mine for a great many years. I

think the shaft went down probably 1,200 or 1,500 feet below the collar of the shaft. These shafts are all some distance above the creek level, 75 or 100 feet or perhaps more. I heard that the ore bodies showed an indication of narrowing; recently they discovered some new ore in their eastern workings and some new ground in a new part of the mine. In some of this property there was good ore quite deep and in others the ore was barren, got barren as they went down. The ore bodies narrowed in the Hercules as it went down. I didn't examine any other properties except the ones that I was interested in particularly. The history of the mining camp is that the bodies narrowed as they went down. I had in mind in making that statement the Tiger and the Poor Man. I think the Poor Man went down 900 feet. It is right across the creek from the Tiger at the upper end of the Burke within a stone's throw of the No. 5 portal of the Hercules. I had looked at the Marsh and the indications that I found there were very unfavorable. In my direct examination I spoke of the ore shoot raking to the west. At the east end it was very narrow, and at the west end it was wider. I think the entire shoot narrowed. The Green Hill Cleveland had narrowed before the 1450, it had narrowed some, and it kept getting narrow as it went down and the ore kept getting leaner until finally between the twenty and twenty-two the ore cut out all together. I meant 1450 below the collar of the shaft and about 100 feet above the creek level. The shaft was the deepest shaft in the district and it was one of the oldest mines there. I had in mind the Gem; it pinched down to just a stringer of ore at 400 or 500 feet; think there was about 16 inches of vein in the bottom of the shaft when they quit. I had in mind the Hummingbird. It had a vein showing on the upper level and a large amount of work was done there and that really shut out the showing, and the more development work they did the less they had in sight, and finally they had to quit, at or about 1,500 or 2,000 feet

below the upper working, they were away up in the mountain. I had in mind the Black Bear; they had a pretty good showing up above and opened up their ledge down below and it was so poor that we would not consider taking a bond on it. They had a good vein but no commercial values that I could see. My recollection is that all of the ore shoots shortened in length more or less. I had in mind a property over in the Saltes district called the Bryan. The ore which was good above turned to iron below. They shipped a little ore, I believe. They had some fine ore in the upper workings. I think I have given you a pretty good list.

What I meant to say was this, that I was more or less familiar by examination or by information or observation with these various properties that I have mentioned, most of them by personal examination, and some of them I worked in as an employe, and some I visited as an officer of the company, and some just from curiosity. And I meant to say that from that experience, from that knowledge, I used my judgment in estimating the value of the Hercules at that time.

The value of the Hercules mine on October 28, 1916, is all together in the judgment of the buyer. The value for a mine, as I apprehend, is what you take out of it after the mine is worked out. As to the fair market value of the Hercules on the 28th of October, 1916, I think the price paid was a very large price for the interest. I think anywhere between the price paid and four million dollars was a reasonably fair price. If you were to eliminate the cash on hand and the ore in transit, bills receivable and that class of things, just looking at the mine as a mine, together with the equipment, mill and refinery, it wouldn't make any substantial change in the price. The thing has got to be considered as a whole without the ore; the smelter and refinery are negligible assets, and without the smelter and refinery the mine is seriously crippled.

Q. I am asking you to assume the mine as it stood, with its total equipment, with its smelter, and with its refinery, as it stood on the 28th of October, but exclude its outstanding assets of cash on hand and amounts due on ore that had been shipped.

Mr. Babb: The same objection as before.

A. I can only say, Mr. Graves, that it all rides together. I think I would have deemed a fair price the amount that was paid less whatever could be gotten for these assets.

(Tr. p. 975 to 994.)

TESTIMONY OF JEROME J. DAY.

I consider the price paid for Mrs. Cardoner's interest in the Hercules too large. I take into consideration the information conveyed in the statements transmitted to me and the general information of the Couer d'Alene district as to what other mines in that district had done. I had in mind particularly the performance of the Standard Mammoth, the Frisco and Tiger-Poor Man. They are practically on the same hill or in a continuation of it. I considered the depth at which they had been worked and at which they had ceased to pay.

(Tr. pp. 1001 to 1004.)

(The witness testified to numbers of mines that had been failures in the Couer d'Alene district.) The business of the Hercules Mining Company and that of the smelter at Northport are separate and distinct the same as if they were a custom smelter. They would buy any other ore. It is taken account of on the books in that manner and settled for in that manner. The estimate of cash on hand of $600,000 in dividing with Mrs. Cardoner was made when we had not settled with the Northport smelter. A final settlement was made in which the mine was found to be indebted to the smelter over $200,000. The estimate of $600,000 cash on hand was

an over-estimate by the sum they owed the Northport smelter.

(Tr. pp. 1010 to 1012.)

MR. SMITH: Q. Based upon your general knowledge of mining conditions in the Couer d'Alenes, and especially in this Burke section, will you state whether in your opinion the price which your brother, Eugene R. Day, paid to Mrs. Cardoner for her interest in the Hercules mining claim and all the properties, was a fair valuation or less than a fair valuation or greater than a fair valuation, and state why?

A. Based upon such information as I had, I believe it to be a large—or greater than its real value.

This is substantially all the testimony, not given in full, but given in substance, of the defendants as to the value of the Hercules mine. The plaintiff introduced the testimony of W. Earl Greenough (Tr. pp. 1032 to 1124). He was an expert engineer, and by substantially the same process of reasoning, except that he estimated the tonnage and value by the ton of the ore to be taken from the mine, he arrived at a value of $10,750,000 for the Hercules mine (Tr. 1059). He did not take into consideration either the cash on hand or the ore in transit in making his calculation, or other properties. In arriving at his values he testified as follows:

By assuming these maps and the answers to the interrogatories as substantially correct, and I based my opinion on those facts or those disclosures. The No. 5 level at that time was apparently the lowest level to which they had opened the west ore shoot, the middle ore shoot, and the two eastern ore shoots, so that in arriving at the tonnage I take as a basis the tonnage so computed in one vertical foot of ore at the horizon of the No. 5 tunnel. In making this calculation I took the lengths as given on the map by Mr. Anderson, and I took the width as given by Mr. Burbidge. And on that basis the west ore shoot would have a length of 325 feet by

a width of five feet, or giving a total of 1,625 square feet. Likewise the middle ore shoot would have an area of 9,450 square feet; likewise the No. 1 east ore shoot would have an area of 800 feet, and the No. 2 east ore shoot an area of 880 feet. This gives a total of floor or stoping area on this No. 5 tunnel level of 12,775 feet. And I assume nine cubic feet as equal to a ton of ore in place, and dividing that—first I multiply that area, 12,775 feet, by one to get it one foot in depth. That reduces it to volume. And then I divide by nine cubic feet, and that gives approximately a little over, but approximately 1400 tons for each one vertical foot of that mine at that elevation. Then, on the 28th day of October, 1916, the ore developed above No. 5 tunnel they have stated was equal to fifty feet. At 1400 tons per foot that would be equal to 70,000 tons. The ore being developed between No. 5 and the 400 level would likewise be computed to equal 560-000 tons. The ore expectant between the 400 level and the 1600 level or 1500 feet below Canyon Creek is 1,680,000 tons. I assumed in making that tonnage estimate that this mine would be profitable at least to a depth, that is, ore shoots would go to a depth of 1500 feet below Canyon creek as gained by experience in that district. Now, to arrive at a fair value of a mine in that way there are several facts enter in, and I wish to exclude the particularly rich ore at the beginning of the operations, and I also wish to exclude the high prices prevailing during 1916. So that in my estimate I take an average of the price for the ten-year period, 1906 to 1915, both inclusive. That average price I get from answer to interrogatory No. 13—or I did not get the average price there, I should say I got the value per ton was $5.17, and for this same period of ten years the average price of silver was 57 cents an ounce and of lead $4.56 per 100 pounds, which is but one cent per hundred pounds higher than the average price of lead for 42 years prior to 1913. So that I assumed that, it only being one cent difference there,

that that average is a fair average, $4.55 per 100 pounds. It is true that as we get down on these ore bodies they do become somewhat baser, more zinc comes in and more iron, and generally there is a gradual decrease in the silver ratio, that is, the amount of silver for each unit of lead. To get at about what that would amount to I have made certain estimates. At the beginning of this ten-year period the mill feed carried a ratio of 9.4 ounces of silver for each ten per cent lead content, and at the end of the period the mill feed carried a ratio of 8 ounces silver for ten per cent lead, so that the average silver ratio for the period would be 8.7 ounces for ten per cent lead. This is but a decline of 7-10th of an ounce below what it was at the beginning of the period. At 57 cents per ounce this decline is equal to 40 cents per ton of ten per cent ore. The ten per cent ore is slightly less than what the average of the mill feed has been. It has been around 11, I think. Allowing for this same ratio in decline of silver ratio below No. 5 tunnel, and allowing increased working cost by virtue of future operations being through the shaft of 15 cents per ton, and for a baser or lower grade ore of 42 cents, I consider $4.50 as a fair value per ton of the ore as may be expected to be extracted from below No. 5 tunnel, to a depth of 1600 feet, which, as I stated, by previous experience and collateral evidence, would seem at least a reasonable depth. Now, since the supply of 70,000 tons of ore above No. 5 tunnel was equal to only three months run at the then rate of 22,000 pounds per month production, I would give that particular tonnage a value equal to that realized from the preceding ten months, namely $9.39 per ton. Then, on the basis of $9.39 per ton for the ore above No. 5 tunnel, and $4.50 per ton for ore below No. 5 tunnel, the value of the Hercules ore shoots developed and indicated on April 28, 1917, would be—value of ore developed above No. 5 tunnel, $675,000; value of ore being developed between 400-foot level and No. 5 tunnel, $2,520,000;

value of ore expectant below 400 level and the 1600 level, $7-570,000, which gives a total of $10,750,000. In my opinion this would be a fair estimate of the future earning value of the mine, and I would look forward with confidence and reasonable assurance that the ore shoots will yield this profit.

Q. Now, in that estimate, do you take into account anything for cash on hand, that date?

A. No. You did not ask me that. I don't take into account cash on hand or ore in transit or book values. I merely made an estimate of the value of that indicated tonnage.

(This estimate was apparently based upon the proposition that the mine would be worked out in 13.7 years (Tr. p. 1103). The witness was asked to make estimates of present value but it doesn't appear in evidence that such estimates were introduced (Tr. pp. 1101-1103).

From the foregoing testimony, can it be said as required by the rules of law with reference to confidential and fiduciary relations, that the testimony is clear and convincing that the Hercules mine, including its property and $1,048,-864.14 due for ore sold, was not of a greater value than $5,-000,000?

The estimates made by the engineers, being widely variant, were excluded practically from consideration by the trial court, and he substantially bases his decision upon the bare estimates placed upon the property by the interested parties, the Day brothers. We believe the testimony of the engineers, when properly considered, not taking their final opinion, but their method of estimating and reasoning should be made the basis of determining whether or not a fair value was paid for this mining interest.

Mr. Burbidge, witness for the defendants, showed ability as a mining engineer and good reasons for his estimates of the quantities of ore (though not as practical as Greenough) yet remaining in the mine. The fallacy of his argument in

estimating something over six million dollars for the value of the mine is so evident that it doesn't require an expert to discover it, and our argument as to value will be largely based upon the expert testimony of Mr. Burbidge, which, when properly considered, is supported by that of the plaintiff's witness Greenough.

The reasoning of Mr. Burbidge, upon which he bases his value of the Hercules mine, as of October 28, 1916, is erroneous in the following particulars:

(a) He bases the value of lead and silver on certain years, which he says were "normal years," these in fact being the years of low prices largely and the fewer years during the previous life of the mine, whereas in determining prospective values an average of the prices prevailing for a period of the same length prior to the date upon which the calculation is based as is estimated for the future life of the mine would be reasonable, and basing the future life of the mine upon the testimony of Eugene R. Day and Mr. Burbidge of approximately ten years, then the average prices for the previous ten years should be taken for determining values. The contention that during the year 1916 abnormal prices prevailed on account of the European war and should therefore be excluded is not according to either reason or engineering judgment for the reason such conditions actually existed at the time and in so far as human judgment could discern would continue for at least a reasonable time in the future. It is a matter of public knowledge that it was the general impression on that date that the war would not end for some years. According to Mr. Burbidge's testimony the average net profit per ton for the ten years preceding October 28, 1916, was $6.04, whereas Mr. Burbidge bases his calculations of the value of the mine on a net profit of $3.00 per ton (Tr. p. 904). This testimony that the value of the mine would be practically doubled if it was based upon the average net profit for the previous ten years was correct.

He also said the average net profit during the previous life of the mine was $6.70, which, if taken as a basis, would increase the value of the mine to more than double his figures, that is, to $10,556,520, not counting cash and ore in transit.

(b) However, there is in our judgment another serious error on his part, and that was his failure to include the ore shipments from 1901 to 1905, inclusive, on the ground, as stated by him, that it was selected ore, and the low grade was thrown aside and kept for milling purposes. This is obviously wrong in theory, for the reason that the low grade ore was subsequently milled, shipped and counted in his averages of later years when milling facilities were obtained. He should therefore have based his calculations of ore contents upon the tonnage of all the years since the mine was opened. Calculating the average profits upon this basis, we find an increase to $7.57 per ton, which would give a value of approximately $11,000,000 instead of $4,726,800.

(c) The testimony of Eugene Day shows that the Hummingbird tunnel was driven about 100 feet above the Canyon Creek level, and that there was approximately 50 feet of ore above the Hummingbird tunnel, altogether estimated by Mr. Burbidge as 1,950 feet of ore still remaining in the mine, from which he estimates that there remains in the mine 1,575,600 tons, which, at $6.70 net profit per ton, would be $10,556,520; added to this the $649,359 cash on hand, $1,048,864 of ore in transit, a total of $12,254,726 would be the result; from which take $278,838 due to the Northport smelter, would leave a balance of approximately $12,000,000 in values deduced from his figures, changing only the basis upon which he figured values. This is a fair basis, as the mine was sold in the very apex of high prices, and it could well be assumed that the average of the previous sixteen years would prevail for the next ten years.

(d) Then another error apparent in Mr. Burbidge's figures is that his estimate is based upon the supposition that

an equal amount of ore will be mined each year until the mine is exhausted. This, of course, the evidence shows to be erroneous, as when the peak of development is reached there will be a gradual decline in ore production until final exhaustion. As an example, it appears from the testimony that there was produced in concentrates and crude ore in 1916, up to the 28th of October of that year, 70,026 wet tons, which included 20,400 tons of crude ore shipped and 231,568 tons of wet milled. From this it will be seen that about one-sixth of the tonnage estimated to be in the mine by Mr. Burbidge was actually mined during the first ten months of 1916 and this testimony shows that more was mined in 1917. There might be one of two conclusions; first, that there was a very much greater deposit of ore than estimated by Mr. Burbidge, or else the facilities for working are such that it will not take over half the time estimated by him in working out the ore. In either event, the value would be much greater.

(e) There is still another error in Mr. Burbidge's calculations, and that is he based his calculations upon previous operations, when in fact several million dollars out of the net profits had been spent for development, machinery and equipment that would not have to be duplicated, and would necessarily in the future be a part of the profits. Of course, the additional cost of hoisting of perhaps 25 cents a ton would have to be calculated against this, which would be but a small item. The future profits undoubtedly would be some millions over previous profits on account of this saving.

The fact that the net profits for the year 1916 were more than $3,000,000, as shown by calculations heretofore made in this argument, and that 1917 was a better year, show how erroneously the calculations of Mr. Burbidge are on mine futures.

From the evidence it appears that 1,638,715 wet tons had been milled up to and including October 28, 1916, and that

139,785 tons crude ore had been shipped, making a total of 1,778,500 tons of ore actually taken from the mine up to that time. The profits shown by the evidence to that date were $11,915,886.74, to which should be added $1,048,864.14 for ore in transit, which had not been paid for up to that time, making a total of profits to October 28, 1916, of $12,-964,754.88, or an average profit per ton of $7.29. Mr. Burbidge estimates that there still existed in the mine on October 28, 1916, 1,575,600 tons of ore; figuring the same average net returns of $7.29 per ton, a total value of the ore in the ground would be $11,286,124. With the present equipment and facilities for removing ore, based upon the work done in 1916 up to October 28, the ore in said mine will be removed if it does not exceed the figures named by Mr. Burbidge within five years, and estimating it at five years and interest at the rate of six per cent, compounded, this amount should be discounted at said rate of interest for a period of two and one-half years. This would make the present value on October 28, 1916, of the ore then in the mine of $9,758,-272. To this should be added $1,048,864.14 for ore in transit, and approximately $400,000 cash on hand, which will total $11,207,136.74 as the actual cash present value of the property owned by the Hercules Mining Company at the time the same was sold by Mrs. Cardoner to Eugene R. Day, in which she held a one-sixteenth interest, and which, from these figures, was of the reasonable value of approximately $700,000.

While the testimony in this case shows that the ore will become to some extent baser as depth is reached, this will be neutralized from the fact that the largest expense connected with the operation of the mine in the nature of machinery and equipment, tunnels, smelters, refinery, mills, protecting property, saw mill, mines, machinery, etc., had already been paid for and deducted from the profits, has already been met, as the mine is now thoroughly equipped for all future

development and paid for out of the profits of past production.

Of course, any value that any man desired to put on this property can be estimated merely by valuation of the ore. If he wishes to estimate the value low, he will base his estimation on socalled "normal years." If he wished to estimate it high, he would take the socalled "boom years," as that of 1914, when it paid more than $9 a ton; but it seems the middle course is the proper course to take, and estimate it according to the average value of minerals for the previous life of the mine. Mr. Burbidge bases his opinion on the values for 1908 to 1912, the very lowest of the sixteen years, although at the time the mine was sold the prices received for products were practically the highest known, with a world's war raging and the prospect for the value of minerals to go still higher, with the prospect of after-war reconstruction of the destroyed countries, it would not take an expert to know that minerals would not decline in value to the low figures upon which he based his estimate. Whether it is proper for the court to consider the actual conditions for the last three years, we are not advised, but know that the general public knowledge about the values of minerals that is known to the court would justify the deductions made by Mr. Burbidge. The record shows (Answer to Int. 14, pp. 77 to 77) that the Hercules mine had received $20,963,618.87 for ore, with net profits of $11,915,886.74, to which should be added $1,048.864.14 ore in transit and not accounted for, making a total of $13,064,750.88.

Eugene R. Day, Allen and others in making estimates of the value of the mine, continually mentioned that the net earnings had been approximately $11,000,000, $2,000,000 too low.

It must not be lost sight of that this company has spent approximately one million dollars for property that is not connected with this mine and which has been paid for out of

the earnings of the company. This has been heretofore referred to in this brief. To be exact, $949,469.11, and this does not include any of the expense, such as machinery, hoists, tunnels, timbering, shafts, cars, tracks, surface developments and property not enumerated in the above calculation that must have cost not less than a million dollars more.

It will be well here to revert to the actual value placed upon this property at the time of the sale. The value of all of the property of the Hercules company excepting the cash on hand, was placed at $5,000,000. There was at that time ore in transit that would be paid for within sixty days amounting to $1,048,864.14, leaving a value of the mine itself of $3,951,135.86. Notwithstanding some fallacious arguments and testimony with reference to ore being always in transit, the testimony of the witness Burbidge shows that this more than a million dollars of ore in transit, which would be cash in a few days and possibly paid in dividends, together with all but $250,000 of the cash on hand, could be distributed in dividends, and the business would continue without interruption. In other words, it is not necessary to have this amount of money tied up to carry on the operations (Tr. p. 1128). There was at the time of this sale practically $1,600,000 in cash on hand, irrespective of the fallacious arguments that might be put up to show the necessity of this situation. This socalled ore in transit had already been sold. There is nothing to show in the testimony the amount of ore actually knocked down in the mine and ready to be delivered to the smelters or mills or already at the mills and not sold. Had the returns been received (and the testimony shows it would be received in a very few days), this would have been in the nature of cash in bank, and we assume it would not have been contended that it was necessary to have $1,600,000 in the bank with which to carry on the business. As stated, the mine proper was valued at ap-

proximately $4,000,000, just a little less. The testimony shows that more than $3,000,000 net profit was taken out in 1916, as has been heretofore shown, and Mr. Eugene R. Day testified that the year of 1917 was a better year for the mine than 1916, which means that the Day family received approximately in dividends in the year of 1917 sufficient to return to them the whole amount of money paid to Mrs. Cardoner for her interest in the mine; certainly counting the two months of November and December with the year of 1917 all their money paid to Mrs. Cardoner was returned to them, or at least the net profits were sufficient to return to them the money so expended. Statements of the witnesses that the property was worth approximately what was paid for it is of but little value in the face of the facts that absolutely disprove such statements, and which show that when such statements were made the witnesses knew they were not true. We are basing this argument practically on the testimony of the defendants in the case.

We understand the great weight usually given to the decisions of the trial courts, but this court is not in any sense of the word bound by the findings of the district court in this case, as this case is tried *de novo* in the Circuit Court of Appeals. The assumption of values as made by the court was based apparently upon offers made and options given and interests sold many years before 1916. There was an offer made to Judge Wood, as the testimony shows, and as we have heretofore referred to, of one-sixteenth interest in this mine for $1,600. Very naturally this would be of but very little probative force in establishing value for 1916, and while the values placed upon the mine in 1906, ten years before this transaction, was considered by the court as establishing value, there had been more than nine million dollars earned since these options were given, and still the mine was estimated to be of practically the same value, and according to our estimate it is now of more than twice said value. We

therefore say that the court committed a very serious error in attempting to base value on options given and interests sold many years before this occurrence.

The fact that the smelting business and the possibility of troubles from Spain gave her concern, only increases the responsibility of Eugene R. Day in seeing that she was properly advised. Under the law he was not authorized to buy the property at all unless he paid a fair value therefor, and then not until he had given her all the information he possessed. It is true she was not bound to keep her property; she could sell it if she desired; *neither was Eugene R. Day bound to buy the property, and if he did he was required by law to pay its reasonable value therefor.*

As the court stated, the margin of uncertainty may be great, but when it is considered that the mine had on hand a million dollars and was paying at the rate of three million dollars a year, or did so pay in 1916 and 1917, the margin of uncertainty was not so great that any reasonable person would know that the value of this mine was much more than four million dollars, and especially since the evidence showed that in 1917 there was more ore taken out at approximately the same price than in 1916. The cost of extraction was practically the same. The matter of marketing and turning into cash was not mentioned, but it is assumed that no trouble was had in that respect, especially on account of the war.

There are a great many suggested problems made by the court that were not in evidence and that Mrs. Cardoner hardly considered in selling her property. We do not believe there were any such uncertainties as the court thought and upon which the court seemed to have based his opinion. We do not count the testimony of the Days, interested as they were, of very great importance, nor that of Hutton. when it is considered that all parties estimated the life of the mine at not less than ten years and that in the one year of 1917 it must have earned over three million dollars.

It is easy enough for a witness to state property is worth so much, but in the face of the facts in this case, their testimony, according to our view, is worthless.

It is true that an approximation of the true value is all that is required, *but that is required,* as the court states. *Not only must it approximate the true value but this must be established by clear and convincing testimony,* as we will show hereafter by quotations from authorities, *and the burden of proof is upon the defendants. Have they met it and is this court satisfied that the testimony clearly and convincingly proves that the less than four million dollars basis value of the mine approximated near its true value?*

We call the court's attention to the following authorities:

"Where one partner seeks to purchase the interest of another he must in utmost good faith frankly and honestly inform the other of all he knows which affects the value of such interest:

Brooks v. Martin, 2 Wall. 70; 17 L. Ed. 732.

Reese v. Bradford, 13 Ala. 837.

Caldwell v. Davis (Colo.), 15 Pac. 696; 3 Am. St. Rept. 599.

Hopkins v. Watt 13 Ill. 298.

Rankin v. Kelley (Ky.) 173 S. W. 1151.

Minir v. Samuels (Ky.) 62 S. W. 481.

Pomeroy v. Benton 57 Mo. 531.

Burgess v. Dierling 113 Mo. App. 383; 88 S. W. 770.

Gilbert v. Anderson 73 N. J. Eq. 243; 66 Atl. 926.

Seal v. Holcomb (Tex.) 107 S. W. 916.

Yost v. Critcher (Va.) 72 S. E. 594.

Finn v. Young 46 Wash. 75; 89 Pac. 400.

1 Rowley on Partnership, Sec. 400.

One only has to read the testimony of Burbidge and Greenough to see that Eugene R. Day never disclosed to Mrs. Cardoner but little of the elements that went to make up the value of this mine. Had he acted in as good faith as

the law requires, he would have had his experts go into the mine, make the necessary measurements, make up full statements of all conditions as the court has required him to make in answer to interrogatories in this case, would have given the size of the ore shoots, have given a detailed statement not only of the conditions but of the possibilities of the mine and would have done this in writing so that she might have had the information for expert advice.

The author continues (Rowley on Partnership, Sec. 400) :

"*It is clear law that in a transaction between co-partners for the sale by one to the other of a share in the partnership business,* there is a duty resting upon the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor *in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows; and that unless such information has been furnished, the sale is voidable and may be set aside.* (Law v. Law, 1 Ch. 140.) * * * If the purchasing partner conceals any facts affecting the value of the interest purchased, equity will grant relief, and the sale may bet set aside or the purchasing partner held to account for his profits in the deal (Nelson v. Matsch (Utah) 110 Pac. 865; Ann. Cas. 1912 D. 1242 N.), and the remedy of such partner is not affected by the fact that his co-partners purchased his interest not from him directly but from a third party to whom they induced him to sell, though not acting for them. * * * It was held in California, however, that when one partner authorized the sale of his interest, the relation between him and his co-partner was at an end, and the latter was not bound to make full disclosures when dealing with him. (Citing Wise Realty Co. v. Stewart (Cal.) 146 Pac. 534). This scarcely seems a just holding, nor in harmony with the general rule requiring good faith between partners."

Rowley on Partnership, Sec. 400.

"An even greater diligence and honesty devolves upon the surviving partner in relation to the property in case one dies."

Rowley on Partnership, Sec. 403.

"The partnership relation is one of trust and confidence, and the members of a firm sustain a trust relation toward each other with reference to partnership matters. (Citing numerous cases.)

"Partnership is 'Eminently a relation of trust, all its effects are held in trust, and each partner is, in one sense, a trustee; a trustee for the newly created entity—the partnership—and for each member of the firm, who thus becomes a beneficiary under the trust. He is more; he is a trustee and a *cestui que trust*—a trustee in so far as his own duties bind him; a *cestui que trust,* so far as duties rest on his co-partners.' " (Citing Goldswill v. Eichold (Ala.) 33 Am. St. Rep. 97.) * * * *"There is no stronger fiduciary relation known to the law than that of a co-partnership, where one man's property and property rights are subject to a large extent to the control and administration of another* (Citing Sollinger v. Sollinger (Wash.) 105 Pac. 236). Substantial concealment and misrepresentation are, as between partners, species of fraud which will not be tolerated."

See Roby v. Colehour 135 Ill. 300, 25 N. E. 777, Affirmed 146 U. S. 153; 36 L. Ed. 922; 13 Sup. Ct. 47.

Rowley on Partnership, Sec. 342.

"A managing partner will not be allowed to take advantage of his position to defraud a co-partner."

Citing Breyfogle v. Bowman (Ky.) 162 S. W. 787.

Rowley on Partnership, Sec. 384.

IV.

The fourth issue into which we have divided this brief, for convenience, is as follows:

"Could the defendant Eugene R. Day purchase the property in question from the appellant, he being the administrator of the estate of her husband and said property being a portion of said estate, and was said purchase prohibited and void by the terms of Sec. 5543 of the Revised Statutes of the State of Idaho."

We are not unmindful of the strong reasoning in the opinion of Judge Dietrich with reference to this phase of the case. His view is that the law of Idaho is only declaratory of the general law that has always existed in cases where the trustee buys property at his own sale.

The statute reads:

"No executor or administrator may directly or indirectly *purchase any property or estate he represents*, nor must he be interested in any sale."

This proposition does not exist in the general law, but we understand the rule to be that contracts prohibited by statute are absolutely void and not voidable, as the court has determined in this case. This is a contract in violation of positive law and such contracts are generally held to be illegal.

It is said by the United States Supreme Court in the case of United States v. Trans-Missouri Freight Association, 166 U. S. 290, that a contract made in violation of law is void, whatever may have been theretofore decided by the court to have been the public policy of the country on the subject."

"An illegal agreement will not be enforced and hence is not a contract according to the definition of a contract."

13 C. J. 410.

"As a general rule any contracts or agreements which involve or have for their object a violation of law are illegal.

"It is immaterial as far as the effect of the illegality is concerned whether the object of the agreement is forbidden by the common law or by statute, or generally speaking

whether the thing forbidden is *malum in se* or *malum prohibitum*."

13 C. J. 411-412.

It was said by the Supreme Court of the United States in Cooper Manufacturing Company v. Ferguson, 113 U. S. 727:

"It must be considered that if the contract on which the suit was brought was made in violation of the law of the state, it can not be enforced in any court sitting in the state charged with the interpretation and enforcement of the laws."

In other words, they held that the federal court sitting in a state could not enforce a contract in violation of that state's law.

The only question as we see it, is whether or not this property actually came within the purview of the statute, and not as the court seemed to conclude that the statute was merely the enactment of the general law as it had always existed.

It is said by the court that this property had passed out of the hands of the executor and had been distributed at that time to Mrs. Cardoner, and therefore he had a right to purchase it. This sale was made on the 28th of October, 1916, and he was discharged as administrator on November 1. As we conceive it, the object of the law was to prevent the administrator from dealing in property that ultimately goes to heirs about which he must have had more information than any other person and therefore in a position to defraud the heirs. Notwithstanding it had been distributed, we believe it was still a part of the estate in the sense of the statute and that he was not authorized to buy it and that any contract he made to purchase this property was not merely a voidable contract, as the court concludes, but is absolutely void, and if so it could not be ratified.

V.

The fifth issue under which we are presenting this argument is as follows:

"Were Jerome J. Day and Harry L. Day innocent purchasers each of an undivided one-fourth interest of the one-sixteenth interest in the Hercules Mining Company's property sold by appellant to Eugene R. Day?"

2 C. J. 467.

"The purchase or acquisition of property by an agent without authority or in excess of his authority including all the terms and conditions, is ordinarily ratified by the principal's accepting and retaining the benefits of such purchase or acquisition."

2 C. J. 500.

In this case Eugene R. Day bought the property with a view of permitting his two brothers and sister to be jointly interested with him if they so desired. He was making a contract in their behalf which they might ratify or not, as they chose, as he was not authorized to make the purchase in their behalf. They chose to ratify the agreement, they themselves paid their own part of the consideration and became purchasers of the property which related back to the original transaction, constituting Eugene R. Day their agent. Under these circumstances they can not plead innocent purchasers.

Hercules Record from 1901 to October 28, 1916, as tabulated from the answers to interrogatories by Eugene R. Day and testimony of defendants in this case:

Year	Average Lead	Average Silver	Tons Mined	Content Milling Ore		Shipments		Content Crude Ore		Content Concentrate			Receipts	Profits	Dividends
				Lead	Silver	Crude	Concentrate	Lead	Silver	Lead	Silver	Value Per Ton			
1901	4.36	58.95	362	....	....	362	.....	59.84	132.13	....	....	$84.53	$ 27,810	$ 20,567	$ 8,000
1902	4.10	52.16	5,003	....	....	5,003	.....	62.34	83.92	....	....	55.12	266,785	169,527	94,200
1903	4.26	53.57	10,043	....	....	10,043	.....	62.28	89.69	....	....	69.75	667,616	438,746	257,800
1904	4.32	57.22	12,226	....	....	12,266	.....	56.40	77.55	....	....	63.55	731,107	430,418	544,000
1905	4.70	60.35	14,691	....	....	11,384	38	55.47	68.81	....	....	66.87	725,218	375,348	228,000
1906	5.66	66.79	74,998	7.34	6.90	9,379	8,178	57.53	58.55	57.53	58.55	74.51	1,272,000	787,534	880,000
1907	5.35	65.32	90,683	7.82	7.54	9,537	10,929	54.20	54.29	54.20	54.29	65.62	1,296,328	765,160	800,000
1908	4.23	52.86	90,087	9.53	9.32	6,395	13,050	56.61	52.55	56.61	52.55	48.46	907,071	383,751	448,000
1909	4.30	51.50	61,820	10.07	9.43	6,076	11,874	54.16	47.01	54.16	47.01	44.70	798,245	325,305	352,000
1910	4.49	53.49	161,550	10.70	9.86	6,627	19,138	46.00	38.87	46.00	38.87	36.52	874,955	418,542	384,000
1911	4.46	53.30	176,325	9.49	8.32	8,459	22,940	49.79	44.89	47.23	37.52	38.30	1,148,574	544,429	329,227
1912	5.15	60.83	180,286	9.20	7.90	11,402	22,595	44.06	40.44	48.18	39.34	43.36	1,415,462	715,763	704,090
1913	4.39	59.78	132,955	10.76	7.97	15,684	25,008	52.02	42.65	54.91	41.77	51.83	2,055,633	1,207,326	1,024,000
1914	3.87	54.81	192,361	12.45	10.58	20,364	39,282	57.32	52.61	55.76	46.56	50.76	2,991,148	1,868,761	2,176,000
1915	4.67	49.69	215,089	10.10	8.02	12,603	36,428	51.20	39.61	53.14	38.67	44.03	2,103,955	1,096,019	320,000
1916	6.85	65.66	231,568	10.88	8.73	20,400	49,144	47.29	35.40	47.95	34.33	54.22	3,690,703	2,368,682	1,432,000
Total			1,650,087			165,984	258,604						$20,972,610	$11,915,878	9,981,227
Average 11 years				9.85	8.60			51.83	46.08	52.23	44.49				
Average 16 years	4.70	57.27						54.16	59.93						

CONCLUSION.

1. The testimony of the expert witnesses, Burbidge and Greenough, shows without the shadow of a doubt that Eugene R. Day did not disclose to Mrs. Cardoner the necessary facts within his knowledge from which she could form a just judgment as to the value of the Hercules mining properties.

2. The evidence does not show clearly and satisfactorily as is required under the law in such cases (the burden of proof being upon defendants) that the value of the Hercules mine and its properties, including more than a million dollars in ore, practically cash on hand, did not exceed five million dollars; but to the contrary, a reasonable estimate made from the testimony of defendants' witness Burbidge, an expert mining engineer, shows beyond a doubt that the value of the Hercules mine and its property, including the more than a million dollars in ore sold and not yet paid for, was of the value of not less than ten million dollars.

These matters having been established, or either of them, will bring this case within the prohibition laid down by the rule in Brooks v. Martin, Supra.

3. The burden of proof being upon the defendants to establish their good faith, full and fair disclosures, that the price paid was approximately the real value of the mine, they have failed to meet the burden of proof, nor was such satisfactory proof made.

4. The laws of Idaho made contracts whereby executors or administrators purchased property belonging to the estate of their decedent void, and Eugene R. Day was the administrator of the estate of Damian Cardoner, deceased, at the time he purchased such property, and although such property had been distributed he was still administrator of such estate and such void contract could not be made valid by subsequent ratification.

5. The introduction of the testimony with reference to the options given in 1906 and which the court considered as proof of value upon rendering judgment, was reversible error for reasons which have been fully stated in this brief.

It is respectfully submitted that under the testimony in this case it should be reversed and rendered in favor of the appellant, or else reversed and remanded for a new hearing.

ETIENNE DE P. BUJAC,
Carlsbad, New Mexico,

CHARLES R. BRICE,
Roswell, New Mexico,
Solicitors for Appellant.

No. 3273

In Equity.

3

In the

United States

Circuit Court of Appeals

For the Ninth Circuit

Mathilde Cardoner,

Appellant.

v.

Eugene R. Day, Eleanor Day Boyce, Edward Boyce, Harry L. Day, Jerome J. Day, F. M. Rothrock, L. W. Hutton, August Paulsen, E. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Lobaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan, Blanche Day Ellis, Harry R. Allen and The Hercules Mining Company.

Appellees.

On Appeal from the District Court of the United States for the District of Idaho, Northern Division.

Brief of Appellee, Harry R. Allen

JOHN P. GRAY.
Solicitor for Appellee, Harry R. Allen.

Press Publishing Company, Coeur d'Alene, Idaho.

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Brief of Appellee, Harry R. Allen

STATEMENT OF CASE.

A brief on behalf of the appellee, Harry R. Allen, perhaps is not called for by the assignments of error in this case.

Mr. Allen was charged by the bill of complaint with

having perpetrated a gross fraud upon Mrs. Cardoner. The trial court expressly found that the charges were not sustained and Mrs. Cardoner's testimony with reference to her transaction with Mr. Allen was not accorded faith or credence by the court.

Suggestion is made on page 40 of the brief of appellant that Mr. Allen was encouraging Mrs. Cardoner to sell the property in question in this suit, and that she was advised if she did not sell she might not get any more dividends and might lose everything. Although the assignments of error do not permit of a reversal of the case so far as Mr. Allen is concerned, it is due his reputation that a brief statement be presented of his relation to the transaction in question.

ALLEGATIONS OF THE COMPLAINT.

The allegations in the complaint, charging fraud against Mr. Allen are found in paragraphs V and VI (pp. 14 to 18). In substance they are that Mr. Allen in October, 1916, approached Mrs. Cardoner, acting under the direction of, as agent of, and in the interest of the defendants Eugene R. Day and Eleanor Day Boyce; that professing to speak purely as a friend, but falsely and with intent to deceive her, he made misrepresentations to her concerning the value of her interest in the Hercules mine; that she might lose the same, either through the speculations of the Day family, or through litigation with relatives of her late husband in Spain, and that unless she speedily sold her interest it would soon be valueless; that Allen urged her to sell the same; alarmed her and that she thereupon authorized him to sell the interest; that she was without knowledge concerning the property or its value;

that she had confidence in Allen's judgment and integrity and was influenced in making the sale by his alleged false representations.

The substance of the entire charge was that Allen, though pretending to act as her friend, was in fact the agent of Day and by the grossest fraud induced Mrs. Cardoner to part with her property for a grossly inadequate consideration, and because of the misrepresentations so made to her by Allen.

Mr. Allen asserted and proved that he acted as Mrs. Cordoner's agent, upon her solicitation; that he conscientiously discharged his duties; that he was not and never had been the agent of the Days or any of them, and that her charges against him were entirely false and unwarranted.

THE FINDING OF THE COURT BELOW.

The trial court expressly found that Allen was not guilty of fraud. We may be permitted to quote that part of the opinion in which this express finding is made:

> "There are charges of both actual and constructive fraud. As to the former, in substance the plaintiff's claim is that the defendant Allen, instigated by, and in collusion with, Day, made false representations to the plaintiff as to the condition of the property and its future prospects, for the purpose of alarming her and inducing her to make a hasty and improvident sale, and that because of her friendship for and confidence in him, she believed him, and was thus fraudulently induced to sell at a grossly inadequate price. In bringing about the sale, Allen undoubtedly acted as the plaintiff's agent, and the

few circumstances which upon their face were perhaps sufficient to warrant suspicion of collusion are satisfactorily explained. Allen was not in the employ of Day or his sister, nor did he act in concert with or at their suggestion. I am convinced that he endeavored to get as high a price as possible. True, he suggested certain considerations to the plaintiff which it may be assumed were intended to put her in a frame of mind to give serious thought to Day's offer, but such is the practice of real estate brokers who are trying to bring together the owner and prospective purchaser. He made no misrepresentations of facts, and laid before or discussed with her only possibilities which furnished legitimate subjects for consideration. Moreover, I am satisfied that at no time did the plaintiff entertain the view that he was representing Day's interests rather than hers. To say the least, the earlier conferences between them are entirely consistent with the theory that she regarded him as her agent, and later, before the sale was consummated, she so designated and empowered him by a formal written instrument. True, at the bank, when the escrow was being deposited, upon the question of Allen's compensation being raised, she seems to have made the suggestion that he was working for the Days. But I am inclined to think that the remark is more significant of thrift than of candor, and was not seriously intended. Certain it is that she did not press the point, but, without objection or protest, aside from the single suggestion, she promptly turned over to Allen a check which she held, for $5,000.00, the amount mutually agreed upon. Their relations continued to be

friendly, and Allen continued to act as her agent in looking after her property interests in Shoshone County. In respect to all other matters, as appears from the letters in evidence, he seems to have been painstaking and to have protected her with the most scruplous care. His apparent candor and directness as a witness left no doubt in my mind of his good faith, and besides, to take the plaintiff's view is necessarily to accept the wholly improbable theory that not only Day and Allen, but the latter's aged father-in-law, a state district judge, with whose family the plaintiff had long been upon terms of intimate friendship, and his wife, had entered into a conspiracy to defraud her. I have no hesitation in dismissing this charge." (R. pp. 1374 to 1376).

There are other findings in the opinion which are to the same effect, but the foregoing excerpt is in itself sufficient.

THE TESTIMONY.

The findings of the court are supported by the testimony. In the first place, Mrs. Cardoner alleged in her complaint and attempted to testify that she regarded Allen as the agent of the Days.

THE RELATION BETWEEN MRS. CARDONER AND MR. ALLEN.

The testimony shows that Mrs. Cardoner was on particularly good terms with Judge W. W. Woods, a district judge for Shoshone County, Idaho, and formerly her attorney, and also with his wife. She visited them in Wallace, she visited them at their summer home on Lake Coeur d'Alene. Harry R. Allen is the son-in-law of Judge and Mrs. Woods.

In August, 1916, at Judge Woods' summer home where Mrs. Cardoner was visiting, she told Mr. Allen that she proposed to have him look after her affairs (Test. Allen, pp. 592-593). This is corroborated by Mr. Wyman, who was present (R. p. 707). Wyman was manager of an investment company at Wallace, which had collected the rents of Mrs. Cardoner's real estate at Burke for many years and had acted as agent therefor. He testifies that sometime later and just before Mrs. Cardoner left for Spokane she called at his office and told him she had turned over all her affairs to Allen and to take up all matters with him and render him statements, which he thereafter did. Wyman testified that the statement attached to Defendant's Exhibit 28 is a copy of a statement made out by him to Harry R. Allen, Agent for Mrs. M. Cardoner and delivered to Allen pursuant to Mrs. Cardoner's instructions (R. p. 708).

E. R. Day testifies that at the close of the administration of the estate of her deceased husband, Mrs. Cardoner told him she had appointed Allen her agent (R. p. 733). Mr. Wourms testifies to the same thing (R. p. 959).

Mr. Allen testified and Mrs. Cardoner conceded, that on October 14, 1916, after the decree of final distribution of the estate had been entered and a statement had been rendered her by Mr. Day, the administrator, she took the papers to Mr. Allen that evening and went over them with him, asking for some explanations from him, and also asked him to look up some matters in connection therewith for her, a memorandum of which he made at the time, and which he introduced (Deft's. Ex. 49, p. 1310)

A series of letters passed between Mr. Allen and Mrs.

Cardoner, showing that Mr. Allen was looking after affairs for Mrs. Cardoner at Wallace. He sold some bank stock for her and transmitted the money to her; made inquiries concerning the certificates of some mining stocks which had been distributed to her and various other matters which she either asked him to look after on or about the 14th of October, or concerning which she wrote to him in the series of letters introduced in evidence (Defts. Exhibits 22, 24, 26, 29, pp. 421-426-431).

On the real estate which had been sold to Mr. Day along with the interest in the Hercules property, there had been some repairs made, and Mr. Allen had induced Day to pay for those repairs, and in his letter of December 8th, told her if there was anything else she desired him to do to feel free to call upon him. The correspondence between Mrs. Cardoner and Mr. Allen is found set forth in her testimony at pages 422 to 436.

With reference to the charge made by Mrs. Cardoner that Allen was an agent of the Days, this is denied by Mr. Allen, who says that he was neither Mr. Day's agent nor represented him in any respect in the transaction and had never been an agent of any of the Days or of Mrs. Boyce (R. pp. 591-589-631). Such also was the testimony of E. R. Day (R. pp. 744-795), and H. L. Day (R. pp. 883-965).

ALLEN'S PARTICIPATION IN THE HERCULES SALE.

With reference to the sale of the interest in the Hercules mine, the transaction is stated by Mr. Allen substantially as follows:

On October 16, 1916, he and Mrs. Cardoner were on the

same train going to Spokane; they talked over her affairs generally; she told him of certain family troubles; they discussed the Hercules interest, and she wonderd what she could get for it. Mr. Allen advised her not to sell it, but she apparently was afraid her son-in-law would come over and upset the probate proceedings and get control of it. She asked him if he thought the smelter was a good business and asked him to see what he could get for her interest in the Hercules, saying that Mr. Day might buy it and to find out what he would give for it.

Allen testified that he returned to Wallace and in a conversation with Mr. Day told him what Mrs. Cardoner had said, and asked him if he was interested in purchasing the interest (R. p. 602). Day said he would think it over and let Allen know (Allen 602; Day, 736-794).

Allen saw Day subsequently and he said he would give $275,000 for her interest (Allen 602). Allen told Day that was not enough, and after some discussion Day said he would think the matter over; that Allen had sprung a serious proposition on him very suddenly (602-3). Later Day raised the price to $300,000. Allen again said he did not think it was enough. He asked Day about the cash on hand, which Day thought was about $600,000, and asked him if he would give Mrs. Cardoner her share of the cash in case a deal was made. Day said he would talk that over later.

Later Allen saw Day again, when Day said there was approximately $600,000 cash on hand, and Allen asked him if he would make an offer of $300,000 for her interest and give her her share of the cash, and Day said he would. Allen then said he would report to Mrs. Cardoner (603-604).

Allen testified that Day said he considered that a fair

price and the only reason he would consider a minority interest of that size was because it would give the Day family control.

Allen testified that either at this conversation or later he told Day if he could not make a sale to him, he would take it up with Paulsen, Hutton (who were also interested in the Hercules) or the American Smelting and Refining Company (Allen 650; Day 740); that he tried to get the top price (650).

On October 23rd, Allen went to see Mrs. Cardoner in Spokane. He reported to her what Day had said and they discussed it for an hour or two and she asked if he didn't think Day would give more. Allen told her he thought he would, but they would have to dicker with him; told her to make up her mind if she wanted to sell and then they would endeavor to see how much they could get for the interest; he would try Day on a basis of $6,000,000, but was satisfied that he could work him up to $5,000,000; he figured on paper the two propositions, one on a basis of $6,000,000 and one on a basis of $5,000,000, showing her what interest in the partnership would bring. He testified that he believed Day would buy it on the basis of $5,000,000 after Day said he would give $300,000, because on the basis of $5,000,000 would only be $312,000 (604-649).

Allen testifies that he told her to make up her mind if she wanted to sell and advised her to talk to her partners, who were in Spokane, and to consult her attorney and friends; if she finally decided to sell, he told her to come to Wallace and it would not take long to get together and complete the transaction (606).

Allen denied (611) that at any conversation with Mrs. Car-

doner he had told her the mine was practically worked out; he did tell her the mine was practically worked out above the Hummingbird tunnel, and he testified that she knew that. He testified that Mrs. Cardoner wanted to sell; that she seemed worried about what her daughter would think of it.

Allen went over the statements of the Hercules which she had showing that it had paid something over $9,000,000 and had accumulated assets that would bring its profits up to $11,000,000 that it had earned during the time it had been operated. He told her of the different mines that both knew about which had been worked out and that from then on down it would cost more to produce ore; that he called her attention to the fact that the Hercules had gone into the smelter business; that it was a new venture; that they didn't know when their ore was mined what price it would bring; that they were taking chances on the lead market and were in competition with the Guggenheims, who were very strong and controlled the price of lead largely in this country, and that she should take those things into consideration, but he did not advise her to sell (613).

He denied that he had ever told her that she would lose her interest or that the people in Spain would cause her any trouble (615); he denied calling her attention to the fact that the Hercules had not paid dividends for four months when lead was so high in price, but said Mrs. Cardoner had that information herself and he knew nothing of it (615).

Mrs. Cardoner went to Wallace on the 27th of October. Allen testified he did not know she was coming; that they again discussed the sale and he told her he had put the proposition up to Day to buy on a basis of $6,000,000, which Day

refused; that Day finally agreed to pay $312,000 for the mine and its assets, give her 1-16th of the cash on hand and had finally agreed to pay $15,000 for the Burke property. He testified that Mrs. Cardoner said she would think it over and made an appointment to meet him at Judge Wood's apartments the next morning at ten o'clock (616-617). He said he asked her if she had consulted her partners and she said she had, but did not say what advice had been given (617).

He testies that on the 28th he met her at the Woods' apartments. Mrs. Woods was there; that he brought an authorization with him for Mrs. Cardoner to sign; she seemed satisfied with it, but when she came to sign it she said she thought the Burke property was worth $20,000 and Allen said he would again see Day (618), and he did see Mr. Day, who agreed to give $20,000 for the Burke property, but refused to raise the price on the mine.

Allen testifies that on October 28th he did advise her to sell on a basis of $5,000,000 for the property (619); that he considered it a fair price, and gave Mrs. Cardoner his reasons for thinking so, which were the same that he had testified to before and in addition he testified he had seen between Oct. 23rd and 27th some statements of the mine's operations and considered it a fair price (621-622).

Judge Woods testifies that he was not present at the interview between Mrs. Cardoner and Allen on October 28th; he was in his private office during the interview; that he had a very general idea what the consideration for the deal was, but he did not participate in any discussion between Allen and Mrs. Cardoner; that Mrs. Cardoner came to his room and asked him what he would advise and he refused to advise her

(712); he told her that with his knowledge of the country and the partnership affairs, if he were the owner of the property and were offered that price, he would accept it.

He denied that he told Mrs. Cardoner in words, substance or effect that if she did not sell the Days would not pay her any dividends or she would not get any dividends, or that if lead were not so high the Days could not afford to give her so much (712). This was in denial of some statements Mrs. Cardoner made concerning a conversation with Judge Woods.

That day a deed was prepared and that evening Allen, Day and a notary went up to Allen's house and Mrs. Cardoner signed the deed and an escrow. Day gave Mrs. Cardoner two checks, one for $5,000 and one for $45,000. Mrs. Cardoner was quite anxious to get away, and Allen agreed that they would go to Spokane Sunday and deposit the deed with Mr. Vincent, vice-president of the Old National Bank (625).

Allen testified that after delivering the escrow to Vincent he and Mrs. Cardoner discussed the commission. Mrs. Cardoner said, "Why, you are working for theDays, aren't you?" Whereupon, he told her he had not been working for the Days, but for her, and she asked him what commission he thought he should have, and he said he did not know and he asked Vincent, who figured it out at something over $15,000; Allen told Mrs. Cardoner he did not want to charge that much, and if she was satisfied, he would take $5,000; she asked him if he would take the $5,000 check, which she endorsed and gave to him (627).

Some attempt was made to make it appear that there was an understanding between Allen and Day with reference

to the two checks. Allen denied that there was any such understanding (627) and Day corroborated him (747). The fact was that Day did not have enough money in any one bank to draw the $50,000 check (744). His bank statement showed that he had $48,797 in one bank, $8742 in another and $211 in another.

Allen actually acted in Mrs. Cardoner's behalf. At first he advised her not to sell her interest; he then advised her to talk to her partners and her counsel. Finally, after she had talked to her partners and still desired to sell, Allen, having in the meantime looked over statements of the Hercules, advised her to sell, and he secured the best price he could.

August Paulsen, a large owner in the Hercules, and L. W. Hutton, another owner in the Hercules, testified that Mrs. Cardoner did discuss with them the question of the value of her interest and whether she should sell it. She talked to Mr. Paulsen about the smelter. He did not advise her to hold her interest or to sell it; he told her that his interest was not for sale. The testimony of Paulsen (pp. 681-695) and of Hutton (pp 670-681) showed that she was acting advisedly. Mrs. Cardoner herself testified that she understood Paulsen to advise her not to sell; she testified that Mr. Paulsen said that personally he would not sell (519-521). Mr. Paulsen testified that he spoke to her about the partnership not having paid any dividends for some months, and he explained to her that the reason was that they had gone into the smelting business and also had a large amount of ore in transit which had not been settled for.

Sufficient testimony has been referred to to show that the findings of the court were amply supported. The reason for

incorporating it here is that Mr. Allen has been charged with gross fraud, and it seems proper to present these questions to the court.

ARGUMENT:

"So far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the creditability of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

Adamson v. Gilliland, 242 U. S. 350.

Respectfully submitted,

JOHN P. GRAY,

Attorney for appellee, Harry R. Allen.

No. 3273

IN EQUITY

United States
Circuit Court of Appeals
For the Ninth Circuit

MATHILDE CARDONER,

Appellant,

vs.

EUGENE R. DAY, et ali,

Appellees.

BRIEF OF APPELLEES

HARRY L. DAY and JEROME J. DAY

Upon Appeal From the District Court of the United States, District of Idaho, Northern Division.

JAMES E. BABB,
Lewiston, Idaho,
Attorney for Harry L. Day.

ISHAM N. SMITH,
Wallace, Idaho,
Attorney for Jerome J. Day.

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No.----------

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Upon Appeal From the District Court of the United States, District of Idaho, Northern Division.

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ISHAM N. SMITH,
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STATEMENT OF FACTS.

Harry L. Day and Jerome J. Day, appellees, contrast plaintiff's allegations with the evidence under topics supported by ample references to the record, and with but little argument or suggestions, followed with references and authorities on the same plan.

All the appellees, excepting Harry R. Allen, Edward Boyce, and the Hercules Mining Company, are owners of undivided interests in the Hercules Quartz Mining Claim and other properties in Shoshone County, Idaho, and are conducting mining operations as the Hercules Mining Company —(a statutory "involuntary" partnership. See First Natl. vs. Bissell, 4 Fed. 701, affd. Bissell v. Foss, 112 U. S.; 5 Sup. Ct. Rep. 851)—under the laws of Idaho.

For many years Damian Cardoner, plaintiff's husband, was owner of an undivided one-sixteenth interest in the Hercules Mine and the statutory mining properties; about 1906, Mr. Cardoner removed from Shoshone County, Idaho, to Spain, where he resided at the time of his death; he died February 25, 1915, testate. Thereafter, his will was held void by the Probate Court of Shoshone County, Idaho, and plaintiff, his relict, Mathilde Cardoner, was adjudged his sole heir, and all of his property within the jurisdiction of that court was distributed to her.

Appellee, Eugene R. Day, is and since he succeeded Harry L. Day in 1912, has been the managing partner of the Hercules Mining Company; upon the petition of Bertha Pouchet, a daughter of the Cardoners, he was appointed administrator of the estate of Damian Cardoner, and acted as such throughout its administration.

The Decree of Distribution in that estate was made, filed and entered October 11, 1916; Mrs. Cardoner appointed Harry R. Allen her agent, and actual possession of the property distributed was delivered to Mrs. Cardoner, the sole beneficiary, October 14, 1916; a certified copy of such decree was duly recorded with the County Recorder of Shoshone County, Idaho, October 25, 1916, at 11:30 A. M., (p. 851).

Decree of Final Discharge of the Administrator was made and filed November 1, 1916, (p. 1308).

On October 28, 1916, Mrs. Cardoner executed a deed and escrow contract with Appellee, Eugene R. Day, (the deed naming appellee, Eleanor Day Boyce, as grantee), whereby she agreed to sell to him her inherited undivided one-sixteenth interest in the Hercules Mining Company and all of its assets, together with one lot in Burke, owned solely by her, for Three Hundred Seventy Thousand ($370,000.00) Dollars, of which, Fifty Thousand ($50,000.00) Dollars was paid cash down, the balance payable, and was paid, within Thirty (30) days, to-wit: November 14, 1916.

Thereafter, on March 19, 1917, Mrs. Cardoner, after publicatoin of the entire complaint verbatim in the Spokesman-Review (record, p. 1012), filed suit to set aside the transaction, charging that it was procured through fraud of Eugene R. Day.

The gravamen of the complaint is that Mrs. Cardoner was of foreign birth, inexperienced in business, ignorant of the values of the properties, and was uninformed of its true value, which she alleges to be at least Twenty Million ($20,000,000.00) Dollars, and of the reasonable value of Thirty Million (30,000,000.00) Dollars—these amounts, inspired more doubtless by the purpose of publishing the complaint first in the newspaper than having it correspond with the evidence, since they are not supported even by plaintiff's evidence, or expert, and while entirely different attorneys are now in charge of plaintiff's case, it necessarily comes to them as it was.

Plaintiff also charges that Eugene R. Day, through

Harry R. Allen, whom she alleged was Day's agent, made misrepresentations which induced the sale, and also charges constructive fraud by claimed breaches of fiduciary relations, to-wit, as administrator, as managing partner and as co-owner, which relations it is alleged, existed at the time of the contract and purchase.

She asserts that Day, as administrator, could not buy her inherited estate; and that, both as administrator and as managing partner and co-owner, Day occupied fiduciary relations to her and was possessed of knowledge concerning the values of the properties involved which he did not divulge to her, and which gave him a dominating advantage over her in the transaction.

APPELLEE ALLEN answered denying her inexperience, etc.; denying that he was Day's agent; denying the misrepresentations; and asserting that he was Mrs. Cardoner's agent in the transaction.

APPELLEES EUGENE R. DAY AND ELEANOR DAY BOYCE answered denying her inexperience; denying all the charges of fraud; denying that Allen was the agent of either of them; and asserting that he was Mrs. Cardoner's agent; and that the transaction was fair, free from fraud of any kind; and that she had been given full information and acted only after independent inquiry and advice; and the price paid for the mine was more than a reasonable value.

APPELLEES HARRY L. DAY AND JEROME J. DAY, who were not parties to the original transaction, answered denying her inexperience, etc.; asserting that they were without knowledge concerning the alleged fraud, and pleading that the price paid was a full consideration; that she had received full information, and made independent in-

quiry; and that they each acquired a one-fourth interest in the former Cardoner interest, *after* the option contract was made; that each paid in full therefor, without knowledge or notice of any fraud, and each received a deed for his interest so acquired. The complaint alleged the theory (p. 25), that whatever one of the Days has been interested in, they have all been partners in, to support the charge that they were all originally parties to the purchase and alleged frauds; but on the trial, her attorney expressly withdrew the allegation and theory (record, p. 980-981).

The deed from Eleanor Day Boyce to Harry L. Day is shown at pp. 1368-1369, and is dated December .., 1916, recorded April 9, 1917.

The deed from Eleanor Day Boyce to Jerome J. Day was given and recorded on like dates. The opinion dismissing appellant's bill is at pp. 1373-1401 of the record.

The record concerning the controverted facts is as follows:

ALLEN'S AGENCY.

Plaintiff alleged (par. 5, p. 14):

"Immediately after the close of the administration in the latter part of October, 1916, plaintiff was approached by defendant Harry R. Allen, who in the transaction next referred to was acting under the direction and in the interest of the defendants Eugene R. Day and Eleanor Day Boyce."

And asserts that Allen stated:

1. That the Hercules Mine was practically worked out;
2. That it was a pure speculation whether any more ore would be discovered;

3. That no dividends were paid for four months when lead was so high in price;
4. That the Days who had charge of the mine were speculating in the metal market with the mine's money and were likely to lose all the money they had;
5. That they were bucking the Guggenheims, and that the Guggenheims had too much money, and the Days would be smashed;
6. That certain people in Spain, claiming under Mr. Cardoner's will, were likely to cause her trouble, and might get her interest in the mine away from her, unless she converted it into cash;
7. That Allen urged plaintiff to sell her interest in the mine as speedily as possible and at the best price she could get, representing that otherwise her interest would very soon be valueless;
8. That as part of the same scheme to procure plaintiff to sell her interest at an inadequate price, Allen figured on paper that the mine was worth only Five Million ($5,000,000.00) Dollars;
9. All of which representations were false and untrue, and were made by Allen for and on behalf of his then undisclosed principals, Eugene R. Day and Eleanor Day Boyce;

Plaintiff alleged that:

10. Plaintiff was greatly alarmed by such representation and believed that she must speedily dispose of her interest or lose it, and thereupon executed authority to Allen to sell her property on the basis heretofore set out;
11. No information was given her concerning any other

property of the partnership;

The complaint. (par. 6) says:

12. "Plaintiff believes, and therefore alleges, that the representations and statements made by Allen, which induced her to make the conveyance aforesaid, were incited and suggested by Eugene R. Day for the purpose of deceiving and alarming plaintiff, and causing her to dispose of her interest in the mine at an inadequate price."

13. "At the time of the transaction, for several years prior thereto, and at the present time," the Hercules properties were of a value of not less than Twenty Million ($20,000,000.00) Dollars, and of the reasonable value of Thirty Million ($30,000,000.00) Dollars, etc.;

14. "Her attention was not directed to the provisions in said conveyance by which she conveyed her interests in all bills receivable, notes, checks, bonds, mortgages and stocks and in and to any and all property of any name, character and description belonging to or owned by the company, whether standing in the name of the company or not."; and

15. "* * * she did not know that the general words used in that decree mentioning bills receivable, notes, checks, bonds, etc., represented any property owned by the Hercules Mining Company, or claimed by it, other than its mines and the mines equipment and the cash on hand. * * * she did not know and no one explained to her that the mining partnership owned any stock or other interests."

in the following properties:

A. The smelter;

B. Refinery; and

C. Ore in transit.

In all of which she asserts a one-sixteenth interest as a member of the partnership.

RETRACTION OF BIZARREE ALLEGATIONS.

(From plaintiff's opening statement at the trial pp. 290-291); MR. GRAVES:

"* * * Now she understood at all times during those negotiations that Mr. Allen was acting as agent for Mr. Day. She never apprehended for one moment that Mr. Allen was her agent. When they came to make the deposit in the bank, Mr. Day had given to Mr. Allen these two checks, and also the deed, which she thought Day executed, to take to the bank. When these two checks, one for forty-five thousand and one for five thousand were delivered to her, Mr. Allen took the Five Thousand dollar check as a commission. And that was the first notice she had, if that was notice to her, under the circumstances, that he was acting as her agent. *Now it may be that in the actual proof of the case we may not be able to show that Mr. Allen was in fact the agent of Mr. Day. I am inclined to think it is not unlikely we may be unable to show that. But we do not regard that as a very material circumstance.*"

(Again, at p. 337):

"MR. BEALE: I wish to object to this class of testimony as incompetent and immaterial, for the reason that there is no connection shown between Mr. Allen and any of the other defendants. I suppose your position in this matter, Judge, is that you will subsequently follow

this with the connection of agency?

MR. O'BRIEN: *I don't think that is necessary. I think the state of this witness' mind is the controlling factor. If she has been induced, it doesn't make any difference from what source, and if she has been overreached as a result of misrepresentation, she can state it."*

MR. BEALE: I make this objection in view of Mr. Graves' statement that they didn't think they were going to prove any—were going to be able to prove any agency existing between Mr. Allen and Mrs. Boyce and the Day boys."

EVIDENCE:

ALLEN WAS MRS. CARDONER'S AGENT.

A. She requested him in August, 1916, at Lake Coeur d'Alene, and from thence enroute, by automobile, to Wallace, Idaho, to act as agent for her.

Allen, pp. 592-593-634.

Wyman, pp. 706-707-708.

W. W. Woods, District Judge, pp. 710-711.

B. Allen thereafter received a statement from Wyman (Rossi Insurance Company) as her agent, and looked after her rent, insurance, accounts, leases, and examined E. R. Day's report as administrator and advised with her thereon.

Allen, pp. 593-594-596-597-598-609 (rents) 635-637-643, Exhibit 49, p. 1310, Exhibit 28, p. 435.

Wyman, p. 708.

C. On October 14, 1916, the estate was delivered to Mrs. Cardoner; thereupon she notified E. R. Day and J. H.

Wourms, his attorney as administrator, that Allen was her agent.

Wourms, p. 960.
E. R. Day, p. 733.

D. The following letters and exhibits, as explained by the witnesses at the following pages, show that Allen was her agent:

Exhibit 49, p. 1310; Allen, pp. 594-598;
Exhibits 19, 20 and 21, pp. 1191-1209; Allen, pp. 606-607;
Exhibits 8 and 9, pp. 1180-1181; Mrs. Cardoner, p. 342;
Exhibit 18, p. 1190; Mrs. Cardoner, p. 418;
Exhibit 11, p. 1183; Mrs. Cardoner, p. 352; E. R. Day, pp. 744-748;
Exhibit 14, p. 1185; Mrs. Cardoner, p. 361;
Exhibit 22, p. 421; Mrs. Cardoner, pp. 421-422;
Exhibit 23, p. 424; Mrs. Cardoner, pp. 424-425;
Exhibit 24, p. 426; Mrs. Cardoner, p. 426;
Exhibit 25, pp. 427-429; Mrs. Cardoner, pp. 427-429;
Exhibit 26, p. 431; Mrs. Cardoner, p. 431;
Exhibit 27, p. 433; Mrs. Cardoner, pp. 433-435;
Exhibit 28, p. 435; Mrs. Cardoner, pp. 435-436;
Exhibit 29, p. 451; Mrs. Cardoner, p. 451;
Exhibit 30, p. 452; Mrs. Cardoner, p. 452.

E. On April 19, 1916, at her first meeting with E. R. Day, she requested back monthly statements of the Hercules Mining Company, which were later furnished. She thereafter received monthly statements up to and including September, 1916.

These statements show, (1) ore in transit, (2) items concerning the smelter and refinery; and she discussed the value of the properties, the smelter and refinery, the Guggenheim rumor, the condition of the partnership property, the failure to pay dividends for four months, and matters pertaining to the mine management with the following persons prior to giving the option of purchase on October 28, 1916:

Allen, pp. 596-598-607-693-696 inclusive.
Paulsen, pp. 683-687 inclusive.
Hutton, pp. 672-673.
E. R. Day—in April, 1916,—720-727,—and at many conversations during the summer—748-749-752, also 790-793 inclusive.

In addition, each monthly statement contained an accurate account of the full amount of dividends paid to that date, the ore shipped for each month, the total receipts for each month, the total dividends for each month, and after the acquisition of the smelter and refinery, showed items relative thereto.

Exhibit 2, February, 1916, p. 1136;
Exhibit 3, October, 1915, p. 1144;
Exhibit 4, January, 1916, p. 1153;
Exhibit 5, July, 1915, p. 1160;
Exhibit 6, August, 1915, p. 1166;
Exhibit 7, September, 1915, p. 1171;
Exhibit 55, April, 1916, p. 1319;
Exhibit 56, May, 1916, p. 1327;
Exhibit 57, June, 1916, p. 1335;
Exhibit 58, July, 1916, p. 1344;

Exhibit 59, August, 1916, p. 1352;
Exhibit 60, September, 1916, p. 1359.

F. Sometime in the Spring or Summer of 1916, E. R. Day, Mine Manager, invited Mrs. Cardoner to visit the mine, and to inspect the books and the partnership properties with anyone whom she might choose. In open court, plaintiff, by counsel, admitted she had never been refused an inspection and investigation of the mine and its properties and several months prior to the trial of the case in open court and during the proceedings on interrogatories, (p. 763), the offer was made to Mr. Graves, her attorney, to permit her in company with anyone whom she might choose to investigate the mine, the mines books and the mines properties.

E. R. Day, p. 763 (tender in open court).
E. R. Day, p. 734 (offer of automobile to take her and anyone she might wish to inspect the mines and properties, etc.)
Mrs. Cardoner, p. 513.

G. She voluntarily suggested the sale to Mr. Day on the 16th day of October, 1916, in her conversation with her agent Allen, and Allen thereafter began negotiations with E. R. Day.

Allen, pp. 600-603 and 635-637-641.
E. R. Day, pp. 735-736-737, et seq.

Mrs. Cardoner had decided to sell before she spoke to Allen about the sale.

Allen, p. 600.

At page 641, Allen says:

"I did not put the idea of selling into her head, she wanted to sell."

E. R. Day, pp. 735-793 (middle) and 794.

H. Up to that time Day had never thought of buying her interest.

E. R. Day, p. 793.

I. During the negotiations, Allen, as agent for Mrs. Cardoner, threatened Day that unless Day purchased the Cardoner interest, he would offer it to Hutton, then to Paulsen, then finally to the American Smelting & Refining Company—the business competitors of the Days.

E. R. Day, p. 740 and pp. 794-795-797.
Allen, pp. 616-617.

J. Allen, for Mrs. Cardoner, demanded one-sixteenth of Six Million ($6,000,000.00) Dollars for the Cardoner interest; Day refused to pay that sum, and told Allen when he made his last offer that he was through, to offer it to anybody else.

E. R. Day, pp. 736-737-804.
Allen, pp. 604-605, also 616-617.

K. On October 29, 1916, at the Old National Bank in Spokane, Washington, Mrs. Cardoner paid Allen Five Thousand ($5,000.00) Dollars as his commission, and did not claim that he was not her agent.

Vincent, pp. 698-702.
Allen, pp. 662-664.

L. Both Allen and Day swear that Allen represented

Mrs. Cardoner and never represented any of the Days.

Allen, pp. 591-653-655.
Day, p. 744.

At no place does Mrs. Cardoner testify that Allen represented any of the Days.

Entire Record.

M. The reasons Day considered the purchase of the Cardoner minority interest were, to obtain control of the majority interests in the mine, to protect the large interests in the properties which the Days already owned, to exclude any foreign adverse interests, and to preserve the friendly partnership.

Allen, pp. 604 (top)-610.
E. R. Day, pp. 797 (middle)-809 (middle).

When Harry L. Day and Jerome J. Day agreed to purchase part of the Cardoner interest from E. R. Day and Eleanor Day Boyce, these same considerations controlled them as they thought the price too high.

Harry L. Day, pp. 975-976-977.
Jerome J. Day, pp. 1005-1013.

N. Allen denies categorically each misrepresentation charged against him.

Allen, pp. 611 to 617-711.

O. Mrs. Cardoner told Allen and Day of her family troubles in Spain; requested each of them at different times to keep her transactions out of the paper and to keep knowledge

of it away from her daughter and Attorney Wilson, one of her original attorneys of record in this case.

Allen, pp. 599 and 600-612-648.
E. R. Day, pp. 716 to 718-782.

(NOTE:—Wilson was employed by Mrs. Cardoner in December, 1916, to settle trouble with Bertha over property in Spain. WILSON, pp. 581-582).

P. At the time the deed was executed Mrs. Cardoner's mental and physical condition was good; she was bright and capable mentally.

E. R. Day, p. 770.
Allen, pp. 668 and 669.
Mrs. Allen, pp. 877 and 878.
W. W. Woods, District Judge, p. 876.

CONFIDENTIAL RELATIONS.

Eugene R. Day as Administrator, Managing Partner and Co-owner.

Numerous charges of mala-fides are made in the complaint against Mr. Day in the capacities above stated. They are so interwoven with other allegations that the matters should be considered seriatim, as alleged, rather than in separate sub-heads. We shall show first, the statements in the complaint; and second, the evidence.

PLAINTIFF'S ALLEGATION NO. 1:

At paragraph 5, pp. 13 to 16, the complaint charges:

Mrs. Cardoner's ignorance of business and mining affairs; her ill-health; that her husband formerly managed their property affairs, gave her no information relative thereto, except general knowledge; after his death, she knew nothing

of the values of their property, or its earnings, except that the earnings were large;

THE EVIDENCE:

Mrs. Cardoner Testified: (references are to pages of record)

Suffers from asthma; lives in Albuquerque, New Mexico, because of illness; built her home there (320); in 1906, husband sold business, but not store, at Burke (320), moved to Spain, where resided at time of death, February 28, 1915 (321); he owned store at Burke and 1-16 of Hercules Mine, and conducted his business his own way without her (323);

She was born in France, married in Switzerland, came to Burke long ago (324); husband transacted business himself (325);

For years she has kept diary (325) (constantly referred to it for dates). Was very bad sick on October 28, 1916 (326).

April 19, 1916, came to Wallace, asked Mr. Day for monthly statements she had not received (327); on August 3rd again saw Mr. Day and asked for statements again (328); after her husband died, she received no statements until Mr. Day gave them to her in April, 1916, (329). Day never explained statements (Ex. 2, 3, 4, 5, 6 and 7) (330);

In August, 1916, saw Mr. Wyman about her real estate in Burke (331) the houses were in bad condition, and she and Wyman examined the store (332);

October 12, 1916, went to Wallace to see about distribution of the estate; both District and Probate Courts

were in session; on October 14, 1916, property delivered to her (333);

Next saw Mr. Day, October 28, 1916, (333) Allen acted for her in relation to lease on house, insurance (336) looked after her insurance from store tenant, rents on store and sold her bank stock (358); got receipt from E. R. Day for $5,000.00 fees as administrator (360).

Cross-examination of Mrs. Cardoner by Mr. Gray:

October 14, 1916, showed Mr. Allen letter from E. R. Day to her, and went over final distribution papers with him (376); asked him if account given her by Mr. McNaughton (Mr. Gray's assistant) was correct (377); she showed Mr. Allen where she thought a mistake was made and examined Exhibits No. 15 and No. 16 with him (379); told him—"you can look after the rents and everything after the house, you know" (380); she discovered what discrepancy existed between McNaughton's statement and E. R. Day's account (388-390) in Exs. 15 and 16, found the figures did not agree (390 to 393) and asked Allen to check them for her and explain (393-394), which he did, per Ex. No. 17, (394).

Her correspondence shows her familiarity with business affairs, and a full understanding of her matters.

See exhibits as follows:

Exhibit 8, p. 1180;
Exhibit 9, p. 1181;
Exhibit 22, p. 421;
Exhibit 23, p. 424;
Exhibit 24, p. 426;
Exhibit 25, p. 427;
Exhibit 26, p. 431;

Exhibit 27; p. 433;
Exhibit 28, p. 435;
Exhibit 29, p. 451;
Exhibit 30, p. 452;
Exhibit 34, p. 500;
Exhibit 35, p. 505;
Exhibit 36, p. 508-510.

Cross-examination of Mrs. Cardoner by Mr. Beale:

She was born in France in 1853; married in Strasburg under the French law, before it became German (454); Bertha was born in Berne, Switzerland, and she came to the United States with Bertha, located in San Francisco, and Mr. Cardoner came later (455);

From San Francisco, she went back to France, thence to Murray, Idaho, (457-458), in 1886 or 1887, where Mr. Cardoner was in business (458). She helped what she could, and at times had charge of the store (458); when Mr. Cardoner went to Burke she had charge of the store at Murray (458); and ran a cigar store (459);

From Murray she went to Missoula, thence to Helena (495); thence to Burke (460). At all the times she kept a diary (460); her husband ran a general merchandise store at Burke, and while living there, she brought suit for divorce; in her complaint at paragraph 6 (463-464) she showed knowledge of his business, income, properties, worth, value of Hercules and other properties;

At her divorce trial, she testified to the size of stock of goods in the store, rental, values of properties, husband's income, his financial condition, his business man-

agement and his properties in mining claims including the Hercules and Hummingbird and Sonora (pp. 465-466-467); and that at Murray, Idaho, she worked in the store "all the time"; and that at Burke "he left me in the store" (p. 466); and showed knowledge of the details and criticized the business methods. This store, a three-story building with living apartments above the store-room, was in the vicinity of the Hercules Mine;

In the Damian Cardoner Estate, she defeated her husband's will, (Exhibit 33) and elected to assert her community property rights instead of taking under the will (Exhibit 32);

After their removal to Spain, Mr. Cardoner engaged in the mining business with which she was familiar (471 to 474); she knew of the estate in Spain, of the money her husband had in the bank, that he kept a safety-deposit box (477); that Mr. Pouchet got her husband's private papers, and that she got some of her husband's cash from the bank in Spain (478); she knew that her husband got monthly statements from the Hercules Mining Company (479);

The Cardoners, while in Spain, subscribed for the Wallace, Idaho, Press-Times and the Spokesman-Review of Spokane, Washington, from which she read articles about the mines (480); knew of the necessity for having her husband's naturalization papers to enter the United States, and the necessity for exhibiting those papers to the immigration officers (482); that the naturalization papers were taken from the safety-deposit box in Spain (482);

She says that she got the monthly statements from E. R. Day in April, 1916, for her daughter, but cannot

tell why she did not send them to her (485-486); that she read the statements, but didn't nuderstand them (487) but claims she never saw the items in the February, 1916, statement relative to the Pennsylvania Refinery and Northport Smelter (489);

Again, she admits finding the alleged discrepancies between the McNaughton account and Eugene R. Day's report as administrator, of $32.65, and explains how she discovered it (494-495); she also admits that she knew from the account (Exhibit No. 15) that the estate received in dividends the sums shown on the report and that the dividends paid the estate which were turned to her in the settlement were $105,500.00 (496).

The other witnesses refer to her as follows:

DR. AHLQUIST, (plaintiff's physician), says:

She talked very intelligently about the different places she had visited before going to his office (315); she was a very interesting character (316); that is, she talked in an interesting, intelligent way; and he concluded she was a woman of intelligence and broad experience as a traveller (316).

Allen says, she was a careful, prudent, keen business woman (667).

Her mental condition was good on October 28th, when the deed and escrow were signed:

Allen, pp. 666-667-668;
E. R. Day, pp. 473-770-744;
W. W. Woods, District Judge, p. 876;
Mrs. Allen, p. 878.

Mrs. Cardoner formerly taught French while re-

siding in the Coeur d'Alenes. She also ran her husband's grocery store.

Judge Woods, p. 710;
H. R. Allen, p. 591.

Her correspondence with E. R. Day shows her knowledge of affairs, fluent use of good English, and understanding of his correspondence.

Exhibit 10 (346); Ex. 34 (500); Ex. 35 (505); Ex. 36 (505);

and in settling with both E. R. Day and Harry R. Allen, she demanded receipts for ~~same~~ sums paid them for services. (Ex. 13, p. 361 and Ex. 14, p. 361).

PLAINTIFF'S ALLEGATION NO. 2:

Complaint, Par. 5, pp. 13-14:

She knew Day was successful manager for long time, and trusted his integrity and hence, desired him appointed administrator.

EVIDENCE:

Certified copy of Petition for Appointment of Administrator shows that Bertha Pouchet, and not Mrs. Cardoner, procured Mr. Day's appointment. (Ex. 37 p. 1231).

PLAINTIFF'S ALLEGATION NO. 3:

Complaint, Par. 5, p. 14:

After Day's appointment as Administrator she sought information from him about the values of the properties, which he did not give but evaded giving; while administrator, he paid two dividends, only, in order to mislead her, though the profits of the mine warranted more frequent dividends; and, while Administrator,

Day sought to buy her property.

EVIDENCE:

DAY SAYS:

"She was interested in knowing every detail concerning the business. She wanted to know every particular thing, and did know it too, as near as I could tell her." (p. 730).

"I gave Mrs. Cardoner all the information that I had that was available of giving, and I have given every Hercules owner every information I have regarding that property." (729).

She visited him—"a dozen" times—during the Summer (1916) and each time they went over the "entire business";

Day, pp. 729-730-731-778-780-781.

He says:

"I gave Mrs. Cardoner a full account of all the operations that were going on (752); * * * "No, I never concealed a thing from Mrs. Cardoner pertaining to that business (752).

"The advantage, I told her, of having the stock (meaning smelter and refinery stock) was simply this, that I considered the business of the parnership better than it ever had been before. That by having a connection with the smelter and refinery we were able to see the ore from the itme it was broken in the mine, through all its processes to the market; that we received and would receive all that there was in it, the by-products and that we would get in general all that there was in the ore (723-726).

During these conversations Day told her of the new mill, the ore in transit, why the dividends were small, the smelter, the refinery, the work below the Hummingbird tunnel, the disclosures of ore therefrom, the reasons which impelled the Hercules Mining Company to embark in the smelter and refinery business, and offered to let her go through the properties in company with whom she might choose, and to inspect the mine, the mill and the books at any time.

Day—Direct examination 720 to 730;—Cross-examination 771 to 794.

The number and amounts of dividends were accurately shown on the monthly statements, and during the administration Mr. Day paid the following sums to the Cardoner family: (Ex. 16, pp. 1187-1188):

Sept. 13, 1915	Mrs. Bertha Pouchet	$ 2,000.00
Sept. 30, 1915	Mrs. Bertha Pouchet	14,630.80
April 20, 1916	Mathilde Cardoner	2,000.00
August 30, 1916	Mathilde Cardoner	2,000.00
	Total	$20,630.80

And at the close of the administration, and when the estate was delivered to Mrs. Cardoner on October 14, 1916, she received from accumulated dividends, the sum of $117,695.92 (Ex. 16, p. 1189) in checks on the banks there named.

Day never sought to buy her property during the administration, or at all. The first intimation he had that Mrs. Cardoner wanted to sell was when Allen, her agent, approached him in October, 1916, after the rendition of the final decree of distribution.

Day, pp. 735-736 (top);
Allen, pp. 600-603.

PLAINTIFF'S ALLEGATION NO. 4:

Complaint, Par. 5, pp. 14 to 17:

Immediately after the administration was closed Allen, as Day's agent, approached her seeking to buy her interest for Day, and made the false statements (heretofore discussed) which so frightened her that she executed the option to purchase, authority to sell, and the deed.

EVIDENCE:

These facts have been sufficiently shown heretofore.

PLAINTIFF'S ALLEGATION NO. 5:

Complaint, Par. 5, pp. 16-17:

In making the first $50,000.00 payment on the contract Day issued two checks; one, for $45,000.00 and the other for $5,000.00; this was part of a scheme to enable Allen to charge her $5,000.00 commission, and thereby appear as her agent.

EVIDENCE:

The evidence shows that October 28, 1916, (when the checks were written) Mr. Day had deposits in three banks, only, to-wit:

Wallace Bank & Trust Co.	$48,797.07
Exchange National Bank (Spokane)	8,842.00
Fidelity National Bank (Spokane)	211.44

(Ehxibit No. 51 p. 1312).

He issued two checks because he did not have enough money in any one bank to pay the full $50,000.00:

E. R. Day, pp. 744 to 748.

He had no thought of Mrs. Cardoner's agent, nor paying him, nor of any such matters as the complaint charges.

E. R. Day, p. 747.

PLAINTIFF'S ALLEGATION NO. 6:

Complaint, Par. 6, pp. 18-19:

She sold upon the basis of $5,000,000.00 for the ~~mine~~ mine and "all assets of the co-partnership known as the Hercules Mining Company (Ex. 18, p. 1190)"—plus 1-16 of the cash on hand (then estimated at $600,000.00) her estimated portion being $37,500.00, with added price of $20,000.00 for the lot in Burke, which was her sole property.

The mine was worth $20,000,000.00 and was reasonably worth $30,000,000.00, and her interest in the cash was more than she received, as the actual cash on hand exceeded $600,000.00.

EVIDENCE:

Her complaint does not seek recission of the sale of the Burke real property, unless the contract is held entire. (Complaint, Par. 8, p. 24).

The cash estimate of $600,000.00 was $278,838.35 more than the true balance.

E. R. Day, ans. Int. No. 21, p. 95.
Jerome J. Day, p. 1012.

The amount paid for her 1-16 interest on a basis of $5,000,000.00 was a fair approximation of the value of the mine and its properties and assets and, in all reasonable probability, was in fact in excess of such value, so far as they were and are capable of being estimated, reasonably.

(a) In 1905, when the mine was eleven years younger than at the time Mrs. Cardoner sold, the Reeves 1-16 interest brought $250,000.00 (basis $4,000,000.00 for entire property) and the Samuels interest sold on same basis.

E. R. Day, p. 755.

(b) In 1905, F. M. Rothrock, the Day family and also Damian Cardoner, gave option to John B. Adams to purchase their respective interests, basis $4,000,000.00 for entire mine. Several hundred dollars were paid on this option, which was afterwards dropped.

E. R. Day, p. 758;

Folsom, pp. 886-887-890;

Rothrock option, Ex. No. 53, p. 1312.

(c) In 1906, J. P. Graves, of Spokane, had option for entire properties, basis $6,000,000.00. Cash payment of $20,000.00 was made and thereafter option dropped.

Folsom, p. 888;

E. R. Day, p. 756.

(d) The following co-owners in the Hercules Mining Company fix the price paid as "all it was worth" and probably in excess of its value, reasonably estimated.

Paulsen, p. 686 (top);

Hutton, p. 672;

(especially) 992;

H. L. Day, pp. 963-976 and 980 to 990—

J. J. Day, pp. 1001-1002-1013;

E. R. Day, pp. 804 to 810; 736 to 744.

(e) The following experts show that the sum paid was equal to or in excess of a fair approximation of the value of the properties and that the prseent value of the probable profits will not exceed nor equal the price paid.

Burbidge (manager of Federal Mining & Smelting Co.) pp. 901-906—and fixes the present value of Mrs. Cardoner's 1-16, on Oct. 28, 1916, at $293,405.00,—p. 907.

Allen, pp. 620-622; 638-639; 649-650; 652.

Greenough (plaintiff's expert) pp. 1101-1102.

PLAINTIFF'S ALLEGATION NO. 7:

Complaint, Par. 6, p. 18 et seq.

Allen's false statements were incited by Day; for the purpose of deceiving and alarming her, and forcing her to sell at inadequate price.

EVIDENCE:

See discussion of Allen's agency, heretofore made.

PLAINTIFF'S ALLEGATION NO. 8:

Complaint, Par. 6, p. 19:

Had she known the true value of the properties, and had she not been frightened by Allen's false representations, she would not have sold.

EVIDENCE:

"I did not put the idea of selling into her head; she wanted to sell."—Allen, p. 641.

See references heretofore under Allen's agency, Mine Values, etc.

He advised her to leave Bertha's share intact.

Allen, pp. 615-616.

PLAINTIFF'S ALLEGATION NO. 9:

Complaint, Par. 6, pp. 19-20:

At the time she executed the deed she either did not read it, or read it or it was read to her in a most casual manner. Her attention was not called to the provision relating to bills receivable, notes, checks, bonds, mortgages, stocks, and any and all property of any name, character and description. She believed and was lead to believe that the only property owned by the company was its mines, machinery and fixtures, cash on hand derived from its operation and not then distributed as dividends; and at the time of the distribution of the estate of her husband, she did not know that the same general words, which were in the decree of distribuiton, represented any property other than the mines and equipment and cash on hand; neither E. R. Day or anyone else explained to her the meaning of those words, and she did not know that the partnership owned any interest in any smelter, refinery, or that there was any ore in transit, or its value.

EVIDENCE:

The deed was prepared Oct. 28, 1916, and was executed in the evening about 8:00 or 8:30 p. m. Mrs. Cardoner noticed that the deed ran to Mrs. Boyce, mentioned that fact, glanced through the descriptions of the mining claims, and came to the last two pages and went over them rather carefully.

Allen, 624—especially 625—656-657-658—especially 658 and 659—(the description in deed

was taken from the decree of distribution) 656.

Mrs. Allen, pp. 878-879;

Wourms, pp. 957-958-959—says, told her what general clause in decree carried; that it carried smelter and refinery stocks and all book assets.

E. R. Day, pp. 743-744. ("Mrs. Cardoner says, 'This takes all of my property, everything,' and Allen said it did").

Mrs. Cardoner knew of the smelter and refinery, the ore in transit, and she discussed the questions of values, smelter and smelter business, refinery, ore in transit, cash reserve, failure to pay dividends for several months with several witnesses before the execution of the deed, and was informed by Allen from the monthly statements she gave him of the items relating to the smelter, refinery, ore in transit, etc.; she also discussed the advisability of acquiring such interests in the smelter and refinery and criticized the management thereon.

Allen, pp. 596-598-607; 693 to 696 inclusive;

Paulsen, pp. 683-687;

Hutton, pp. 672-673;

E. R. Day—In April, 1916, and at many other conversations during the Summer, she went over each item of assets and everything pertaining to the mine and its properties.

pp. 720 to 727; 748-749; also 790 to 793 inclusive.

Each monthly statement contains an accurate statement of the full amounts paid as dividends from the first

dividend on down; sets out the number and amount of dividends for each current month; the total receipts item by item; the ore shipped; receipts from ore sales and items relating to the smelter and refinery are found in each monthly statement which was issued after such properties were acquired.

Exhibits 2, 3, 4, 5, 6, 7, 55, 56, 57, 58, 59, 60.

PLAINTIFF'S ALLEGATION NO. 10:

Complaint, Par. 7, pp. 20-21:

Day had been general manager of the mine and its properties for years; was paid a salary by the partnership and was their agent; was an experienced mining man, capable of judging ore bodies and their values; knew every detail relative to extent and value of ore bodies, the cost of mining and marketing ore; knew of the probable permanency and value of ore bodies, the demand for ore and the value thereof; was familiar with the smelter at Northport and the refinery at Pittsburg and the advantage of ownership by the partnership in those properties; and the probable increased future profits therefrom.

EVIDENCE:

Day became manager about 1912; he was paid a salary by the partnership as manager; he was not a mining engineer, but a practical mine operator and manager; he could judge ore bodies only when they were exposed; his knowledge of the mine was such as he had gained as manager; in the prosecution of the work, the Hercules Mining Company did not develop a great deal of ore bodies, but took the ore as it came; Day knew the

market values of ore and dealt with the smelter at Northport.

He explained to Mrs. Cardoner fully about the smelter and the refinery, told her why those properties were necessarily acquired, told her the advantage which their Herclues Mine gained because of owning stock in both the smelter and refinery, and explained to her that the partnership prospects for profits were better than ever and that they could see the ore from the time it was broken, through all its changes, to the market.

Paulsen, p. 692;

Day, pp. 725 to 727; 731; 748 to 749; 766 to 767; 780; 781 to 790.

Mrs. Cardoner criticized the management for the smelter and refinery transaction and expressed her disapproval to both E. R. Day and Paulsen, at different conversations.

Day, pp. 726; 727; 775; 781;

Paulsen, pp. 685.

PLAINTIFF'S ALLEGATION NO. 11:

Complaint, Par. 7, pp. 22-23:

As administrator, Day had become familiar with her husband's affairs, knew of the possibility of some question being raised about Mrs. Cardoner's right to inherit, and knew the general business and financial condition she would be in when the administration closed.

He knew she was joint owner in the mine with him; knew that her husband, in his life-time, trusted him, and as administrator had gained her confidence.

She trusted her husband during his life-time and

knew nothing of his business except in a general way.

EVIDENCE:

Mrs. Cardoner, herself, had defeated her husband's will:

Exhibits No. 32 (p. 1120) and No. 33 (p. 1224).

She was well acquainted with his business. She had discharged E. R. Day and had another agent and other advisers, including separate attorney, John P. Gray, well known in mining circles.

Discussion heretofore.

PLAINTIFF'S ALLEGATION NO. 12:

Complaint, Par. 7, pp. 22-23:

She had at no time any knowledge as to the value of the Hercules Mining claims; nor of the different properties owned by the partnership; nor of the smelter or refinery, and had she known of them, she had no knowledge as to the extent and profits of the partnership or what might probably be expected in its future operations.

EVIDENCE:

Her divorce complaint and testimony in great detail disclosed accurate knowledge of her husband's affairs at the time it was filed in January, 1903 (p. 465).

Divorce Complaint, Par, 6, set out pp. 463-464.

Divorce Testimony, pp. 465 to 468.

Her extensive itinerary, knowledge of affairs in general, talks with E. R. Day, with Mr. Paulsen, Mr. Hutton, Mr. Allen, and others, about the mine, its values and the advisability of selling; her knowledge of reading

and writing the English language; her ability in checking complicated accounts; her experience as helper in running her husband's store, in close proximinity to the mine; her reading in Wallace, Idaho, and Spokane, Washington, papers of net profit statements of the mine for taxation; and her scholarship as teacher of French, have been heretofore shown.

E. R. Day, pp. 787-788, says:

"Q. Now in these various conversations beginning with April and running down to whenever they did run to, did she discuss the settlement of the estate with you?

A. She did discuss the settlement of the estate.

Q. In each one?

A. At all times she discussed that.

Q. Now what would she ask you about the settlement of the estate?

A. Well, she said many things in reference to it, that she wanted to get it settled up and that she wanted to get the money.

Q. She said that in April?

A. Yes.

Q. And in each of the other conversations?

A. *That was the main reason for her coming here to find out about the business and get everything terminated.*"

Harry R. Allen gives this testimony, (p. 641):

"Q. Didn't you tell her all about all of the elements that you have repeated here in your direct examination of reasons why you thought she should seriously consider the question of selling?

A. I did not put the idea of selling into her head. She wanted to sell."

And at pages 615 and 616, he says:

"Q. Mr. Allen, was that the conversation at which you advised her to go and talk with Mr. Hutton and Mr. Paulsen and her lawyer?

A. Yes, sir. I don't know whether I have testified to this or not, but either at that time or later on I asked her if it would not be a good idea for her to sell her share and leave Bertha's intact."

On October 14, 1916, the Cardoner Estate was settled and the property turned over to her. Mr. Day gave her a statement of the affairs of the estate which is Exhibits No. 15 and No. 16 (pp. 1185 to 1189).

Mrs. Cardoner checked this account herself, and discovered the two alleged discrepancies, and immediately and on October 14, 1916, she went to Allen, pointed them out to him and asked him to investigate and explain them, which he did.

Mrs. Cardoner, pp. 378 to 380;
Allen, pp. 593 to 596. Exhibits No. 17 (pp 1189-1190) and No. 49 (p. 1310).

The deed to Eleanor Day Boyce executed October 28, 1916, describes the same property which she received in the Decree of Distribution.

Compare Ex. No. 46, pp. 1275 to 1307 with the copy of deed set forth as Ehibit "A" to the amended complaint (pp. 28 to 54) and with the abstract of such deed, (Ex. No. 10, pp. 1182-1183).

When she first talked of selling her interests, she

told Allen she—"Wanted to clean—she wanted to clean up on her holdings up there in the Coeur d'Alene country for the reason that she was afraid that this son-in-law would cause her trouble.

Allen, pp. 605-606.

PLAINTIFF'S ALLEGATION NO. 13:

Complaint, Par. 7, p. 23:

At no time during the negotiations leading up to the contract of October 28, 1916, and the deed, or at any other time did E. R. Day or Eleanor Day Boyce, or any one else, disclose to her the true matters and things pertaining to the value of the mines and mining partnership property or any statement or explanation as to their values, or probable future values, or probable future earnings or any disclosure that tended to disclose to her the value of the property rights in those mines and the assets of the partnership, EXCEPT the false and fraudulent statements of Allen.

E. R. Day well knew her ignorance, and that had he disclosed such information to her, she would not have made said contract and deed.

EVIDENCE:

Three days after the date of the final decree of distribution and on October 14, 1916, and after her agent Allen had examined the final account and having had an attorney during administration, separate from the attorney for E. R. Day as administrator, she received actual possession from the administrator of the property described in the Decree of Distribution; also, the account of

E. R. Day as administrator, and gave notice that Allen was her agent. (Exs. Nos. 15 and 16).

She theretofore had received the various monthly statements with a full itemized account of the business for each respective month; had talked with E. R. Day at various times from April 19, 1916, to October 14, 1916; and had meanwhile, talked with Paulsen, Hutton, Allen and Mrs. Woods as heretofore shown.

Each monthly statement showed:

1. The entire sums paid out as dividends;
2. The particular dividends and the amount thereof for the current month;
3. The ore shipped each month;
4. Returns from ore sales, each month;
5. Amounts expended on both smelter and refinery from their acquisition;
6. A particular itemized statement of every receipt and disbursement; and
7. Day explained to her that it takes from three to four months to get returns from smelter.

Day, pp. 726-775-783.

She made up her mind to sell, as heretofore shown; and Allen got E. R. Day to pay the "top price" (650); and Day reached the point where he told Allen that he was "through" and to take the property to others (737 et seq).

All these matters have been heretofore sufficiently shown.

PLAINTIFF'S ALLEGATION NO. 14:

Complaint, Par. 7, p. 23:

Day well knew her igonrance on these subjects and well knew that she would not have sold, nor executed authority to sell if he had disclosed either the properties owned by the partnership or their values, to her.

EVIDENCE:

The Decree of Distribution contained the same properties described in the deed. Her statement of the property of her husband, as set forth in Par. 6 of her Divorce Complaint contains properties then owned, and the monthly statements contained the smelter and refinery; the ore in transit, the ore shipments, etc., and in the sale, she was informed of the cash on hand not distributed because it was a circulating or revolving capital fund, and she received her portion thereof on an estimate which was $278,838.35 over the true cash balance.

See discussions of evidence heretofore.

Mrs. Cardoner made up her mind to sell (Allen, pp. 605-606) (641); consulted her co-partners Paulsen and Hutton on the advisability of such sale; advised with Mrs. Woods and Allen as to the price, told both Allen and E. R. Day of her troubles with her son-in-law and assigned that as a reason for sale; and Allen advised her to retain at least Bertha's interest in the mine and sell only her own (Allen, pp. 615-616).

PLAINTIFF'S ALLEGATION NO. 15:

Complaint, Par. 8, pp. 23-24:

She discovered the "fraud" practiced on her, in

December, 1916; elected to rescind; tendered purchase money back to E. R. Day and Eleanor Day Boyce and demanded re-conveyance; both were refused.

EVIDENCE:

Her attorney, Wilson, told her in New Mexico, on December 4, 1916, without having examined the property and without knowledge as to it or its value, that she had not received enough. He left for Spokane and Wallace on December 6, 1916, and—"found out things" —returned December 18, 1916, to New Mexico.

Mrs. Cardoner, pp. 363 to 366; 447 to 449;
Wilson, pp. 579-580.

Neither Mr. Wilson nor Mrs. Cardoner tell what it was Mr. Wilson—"found out"—nor the source, reliability accuracy nor credibility of what it was he—"found out."

Wilson received a contract for 1-12 of the recovery entirely contingent.

Wilson, pp. 583-586.

PLAINTIFF'S ALLEGATION NO. 16:

Complaint, Par. 8, p. 24:

She has no desire to rescind as to the Burke real estate; but if the Court should hold the contract entire, she will do so; claims she is entitled to a recission and accounting and avers her readiness to do equity.

EVIDENCE:

In addition to the fact that Mrs. Cardoner is satisfied with the sale of the Burke real property, she re-received $37,500.00 as her part in the cash on hand then

estimated at $600,000.00; whereas the true cash on hand was only $370,521.13.

E. R. Day, Ans. Int. No. 21, p. 95;
Jerome J. Day, pp. 1011-1012.

She ~~as~~ was overpaid in the cash item, by more than $14,342.43.

PLAINTIFF'S ALLEGATION NO. 17:

Complaint, Par. 9, pp. 25-26:

Allegations asserting her right to an accounting and to a discovery; that she is still a member of the partnership but is wrongfully excluded from participating in its properties and profits and that for a full adjustment of all her equities, all the partners are necessary defendants.

EVIDENCE:

Mrs. Cardoner was never denied an inspection of the books, the properties or the affairs of the partnership.

Mrs. Cardoner and Mr. Graves—p. 513.

During the proceedings relative to interrogatories, in open court, defendants offered her the right to inspect the mine, the books and the properties which her counsel refused in open court, and preferred to depend upon Mr. E. R. Day's answer to the interrogatories.

E. R. Day, p. 763.

From April 19, 1916, to October, Mr. E. R. Day as mine manager had a standing offer to her to visit the mine with whom she wished, and to inspect the properties, the books and the condition of the partnership.

E. R. Day, pp. 734; 720-721.

SIZE, VALUE AND EXTENT OF KNOWN ORE BODIES ON OCTOBER 28, 1917.

PLAINTIFF'S ALLEGATION NO. 18:

Complaint, Par. 6, pp. 18-19:

The ore bodies were better developed and more valuable than ever before, and the price of metals was higher, and the mine was earning more money at the time of the transaction than it ever had before.

EVIDENCE:

Earnings of Mine:

Witness Paulsen, pp. 691-692:

Q. "You mined more in the first ten months of the year 1916 than you had mined in any previous year, didn't you?

A. "Well, I presume the reason we mined more, the prices were getting to be good.

Q. "Pardon me, Mr. Paulsen, you did mine more, didn't you?

A. "Well, I couldn't say; the figures will show that. If you have got the figures they will show that.

Day, p. 842.

Eugene R. Day answered certain interrogatories propounded by plaintiff. The questions and answers bearing upon this factor are:

Interrogatory No. 12, p. 57; Answered, p. 65.

Interrogatory No. 13, p. 57, Answered pp. 66 to 72.

From which we furnish the following tables:

ORE SHIPPED.

YEAR	TONS Wet	TONS Dry		DRY TONS % LEAD	DRY TONS OZ. SILVER	Per Cent Calculated	AVERAGE PRICES OF LEAD	AVERAGE PRICES OF SILVER	AVERAGE PRICES OF ZINC
1901	362	329		59.84	132.13	2.28	4.36		4.085
1902	5,003	4,840		62.34	83.92	1.34	4.10		4.90
1903	10,043	9,571		62.28	89.69	1. 2	4.26		5.62
1904	12,266	11,505		56.40	77.55	1.,7	4.32		5.17
1905	11,422	10,485		55.47	68.81	1. 4	4.705		5.995
1906	17,712	17,072		57.53	58.55	.01	5.66		6.275
1907	20,466	19,755		54.20	54.29	.00	5.35	65.32	6.205
1908	19,445	18,717		56.61	52.55	.928	4.236	52.85	4.74
1909	17,950	17,656		54.16	47.01	.868	4.30	51.50	5.52
1910	25,765	23,959		46.	38.87	.845	4.45	53.49	5.66
1911	31,399	29,989		49.79	44.89	.901	4.46	53.30	5.91
			Conc.	47.23	37.52	.794			
1912	33,997	32,642		44.06	40.44	.917	4.485	60.83	7.11
			Conc.	48.18	39.34	813			
1913	40,816	39,664		**52.02**	**42.65**	.819	4.40	59.795	5.80
			Conc.	54.91	41.77	.778			
1914	60,560	58,929		57.32	52.61	.917	3.87	54.81	5.30
			Conc.	55.76	46.56	835			
1915	49,442	47,783		51.20	39.61	.773	4.675	49.685	14.44
			Conc.	53.14	58.57	1. 00			
1916	70,026	68,063		47.29	35.40	.747	6.83	65.66	13.75
			Conc.	47.95	34.33	.715			

NOTE—1916 calculations to October 28, 1916, only.

The average annual prices of silver, lead and zinc from 1901 to 1916 are set forth at the following places:

Exhibit No. 62 (Defendant's exhibit) p. 1369.

Exhibit No. 64 (Defendant's exhibit) pp. 1370-1371.

ORE BODIES.

The following witnesses established the following characteristics and facts concerning ore bodies in the Coeur d'Alenes:

(a) They are lens-shaped; they peter out gradually unless cut off by a fault;

Burbidge, (Manager Fed. M. & S. Co.) p. 932;

H. L. Day, p. 978;

E. R. Day, p. 817 (Middle).

(b) They shorten up, get narrower and baser or the values diminish and the porperty gets poorer with depth.

Burbidge, (Manager Fed. M. & S. Co.), pp. 901-902;

H. L. Day, p. 978;

E. R. Day, pp. 66 to 72 (Answer to interrogatory No. 13, tabulated, supra).

These facts are true of all the neighboring mines to the Hercules;

Burbidge (Manager Fed. M. & S. Co.), p. 901 (bottom) 904-919 and 920-1125 (middle);

Allen, pp. 612-613;

H. L. Day, pp. 979-980;

J. J. Day, 1001-1002-1006 to 1009-1013, (bottom).

E. R. Day, p. 728 (told Mrs. Cardoner of Tiger) 727 (bottom); 820; also 762 (bottom).

(c) In the Hercules Mine, there were three ore shoots at the Hummingbird or No. 5 tunnel; the development work done after October 28, 1916, demonstrated that the east ore shoot had petered out or cut-off; the middle ore shoot was raking to the west ore shoot and indications were that it was merging with it and would so merge with it at or about the 800 level; and the west or large ore shoot was shortening and had shortened from 100 to 125 feet, and had narrowed from 15 feet in width to 12 feet in width.

These witnesses tell of the ore shoots, their length and width, at the Hummingbird or No. 5 tunnel; and the showing made by the work below it.

E. R. Day—(Speaking from memory and approximating distances.) pp. 824-825; says:

At No. 5 tunnel, east ore shoot is 160 feet long; west or shoot, about 600 feet; middle ore shoot (not given).

After extended cross-examination pp. 833 to 866, he says on re-direct examination:

Length of ore shoots at No. 5 or Hummingbird tunnel; (pp. 867 to 869) east ore shoot is 125 to 150 feet long; middle ore shoot is 250 feet long, (not sure) west ore shoot is 600 feet long.

And states that the east ore shoot "cut-out" before it reached the 200 level below that tunnel; and "west" ore shoot had "shortened up"

about 125 feet; and at the 600 level it had "shortened" 125 feet; and the indications were that the middle ore shoot was merging with the "big" ore shoot (west).

Q. You mean submerge?

A. Yes, absolutely comes together, intersect.

And at p. 869 says the ore bodies are shortening and getting continually baser as you come down; the silver values are lowering all the time.

See also answer to Interrogatory No. 8 (p. 65) and his testimony at pp. 551 to 552; 722, 723, 724, 727, 728, 749, 750 751 (530 feet down) 773, 776, 778, 785, 792, 812, 813, 817, 818, 821, 822, 823, and at 841 says they had been "rustling to get ore" for about a year and a half before October 28, 1916 —and at pp. 854 and 855 says there are signs of the supply of ore falling off and that these signs have developed since October 28, 1916; and at p. 869 says, the ores are losing their lead and silver values and getting more iron; and at p. 870 says the situation not as bright as it was on October 28, 1916.

WITNESS ANDERSON(Hercules Engineer, called by Plaintiff) Says the fault on Ex. "B." shows the limits of the ore shoot (1027); that the ore limits on the exhibits "I" and "B" are shorter than the timbering; the ore bodies at No. 5 terminate at the "Fault" which is the eastern boundary of the ore shoots. (pp. 1027-1029-1031);

WITNESS BURBIDGE (Manager Fed. M. & S. Co.) at p. 924, gives these figures from measurement— (stepped it off)—

(Refers to Exhibit No. 54); (Measured at No. 5

Tunnel) east stope (ore shoot) is 150 feet long; middle stope (ore shoot) is 225 feet long; west stope (ore shoot) is 600 feet long;

"East stope has a length of 150 feet. It shows the same length on the 200 level. It does not appear at all on the 400 level. It is cut out or merged in this middle stope.

"Middle stope has a length of 225 feet. * * * * The middle stope comes down almost vertically without any particular rake. What it has is slightly to the west. It is quite evident that at some step very little below the 600 level it will merge in the west stope. * * * * And there is very little doubt that the middle stope will also be cut off or merged in the same stope and that below a depth of about 800 feet there will be but the one shoot of ore, the west shoot.

Speaking of the west shoot, he says:

"The length of that stope on the No. 5 tunnel is 600 feet; on the 200 level it is only 500 feet. On the 400 and the 600 it is also—on the 400 it is shorter. On the 600 the drift has not yet reached the end of it but it is so near to it that we are safe in assuming that it will be the same length, 500 feet.

Q. (p. 924) How long will that be approximately, Mr. Burbidge?

A. 500 feet if it maintains its present width.

Same witness at p. 925, says:

Q. What is the width of the ore shoot, the west ore shoot on the No. 6 tunnel?

A. The 600 you mean?

Q. The 600 level.

A. Average about 12 feet.

Q. As compared with the drift of it on the No. 5 tunnel level?

A. 15 feet.

PLAINTIFF'S WITNESS EARL R. GREENOUGH, DISREGARDS PHYSICAL FACTS.

Plaintiff's witness, Earl R. Greenough, was the sole witness who testified on the subject of value, for plaintiff. He makes the following statements:

There are four (4) ore shoots at No. 5 or Humingbird Tunnel as follows: (p. 1084);

East ore shoot No. 2, length	220 feet
East ore shoot No. 1, length	200 feet
Middle ore shoot, length	630 feet
West ore shoot, length	325 feet
Total	1375 feet

He "estimates" that the ore bodies of this length (1375 feet) will go 1500 feet below the creek level (p. 1084).

Q. 1375?

A. If my calculation is correct.

Q. As compared with 500 if my assumptions are correct?

A. I didn't catch that.

Q. Well, your figures are based on 1375 feet of aggregate feet of ore shoots?

A. Yes, that is what I stated in making my estimates, that they are based on the lengths designated on the maps.

His estimated tonnage (pp. 1056 and 1057) is based

upon the following lengths, widths and continuations of four (4) ore shoots which he claims from the "apparent" outlines on the exhibits—not from actual measurements or investigation.

	Length	Width	Area
East ore shoot No. 2	220 ft.	4 ft.	880 sq. ft.
East ore shoot No. 1	200 ft.	4 ft.	800 sq. ft.
Middle ore shoot	630 ft.	15 ft.	9450 sq. ft.
West ore shoot	325 ft.	5 ft.	1625 sq. ft.
Totals	1375 ft. long		12,755 sq. ft.

which he erroneously states at 12,775 sq. ft. (p. 1056).

He says he "ASSUMES" that these lengths (aggregating 1375 ft.) will go to a depth of "1500 feet below Canyon Creek." (p. 1057).

The PHYSICAL FACTS are that the EAST ore shoot has "cut-out;" the WEST ore shoot has shortened by 100 feet at the 200 level below No. 5 or Hummingbird Tunnel; the MIDDLE ore shoot is merging with the WEST, and from all indications will completely merge therewith at the 800 level below the No. 5 Tunnel.

Using his own figures, these facts cut off or eliminate the following lengths from his "ASSUMED" length, to-wit:

East ore shoot ..... 420 feet;
West ore shoot ..... 100 feet; shortened up;
Middle ore shoot ..... 325 feet; merges with large shoot.

845

Leaving, according to his erroneous measurements, an ore length of 1375 feet less 845 feet, or 530 feet from the 800

level down, which, of course, destroys his estimates and shows them to be wholly theoretical.

At pp. 1075 to 1084, he concedes that if the physical facts exist as outlined—and there is no evidence they do not—the estimates would change accordingly, corroborating ours; he also concedes that the "fault" if projected, would cut off certain ore bodies.

SMELTER AND REFINERY.

Because plaintiff placed such emphasis on those two properties, we refer to the testimony which shows that these properties simply took the place of the former ore contract, which the Hercules Mining Company was unable to renew, and were necessarily acquired as direct access to the market, also to remove hazards of ore contracts from time to time, and not for their alleged intrinsic values, otherwise than a vehicle to market the ore without the aid of middlemen, thereby eliminating ore contracts; that in fact they have no other value, and when the mine bottoms, their value is only junk; that in all good mining management they are charged off to loss, and considered as nothing in estimating the assets.

Burbidge, p. 905;

Q. What disposition do you make of the investment in the Northport Smelter and in the Pittsburg Refinery, mining stocks and the mill and the equipment of the property?

A. I made no disposition of them. That is I did not take them into consideration as an asset. They had no realizable value.

Q. Will you tell the Court why, please?

A. Because at the end of the operations of the mine

they will be valueless. Part of the machinery may be sold for ten or fifteen or twenty per cent of its cost, possibly, but that is all that can be sold.

Q. How about the smelter?

A. The same is true of the smelter. The Northport smelter laid idle for—oh, I don't know, ten or twelve years and represented an investment of probably originally half a million dollars, and, as testified here, it was bought for eighty thousand dollars.

Q. What disposition or consideration did you take of those respective mining stocks you saw listed in the interrogatories?

A. I gave them no value.

Q. Tell the Court why, please.

A. Because there is no known value. They are purely speculative. Some of them I believe have been, you might say, the victims of over-development, etc.

The following witnesses testify similarily, and the evidence is not contradicted.

Burbidge, pp. 925-926, and quoes from Hoover's Principles of Mining—pp. 926-927; Mr. Burbidge says: "Mr. Hoover is recognized as one of the bright particular stars of the mining profession." See also p. 1127.

H. L. Day, pp. 992-993, also 978-979.

J. J. Day, pp. 1011, also 1010.

E. R. Day, pp. 767 to 770; 775-781.

WITNESS ALLEN says, p. 602:

"And he—(E. R. Day)—made the remark at that time that he would rather have the ore that was taken out than his interest in the smelter and refinery, because at that

time it was a question whether that was an asset or liabiliay."

EUGENE R. DAY, AS ADMINISTRATOR.

PLAINTIFF'S ALLEGATION NO. 19:

Complaint, Paragraphs 4, 5, 6 and 7, pp. 12 to 23:

Several allegations are made against E. R. Day as administrator of the Estate of Damian Cardoner. It is asserted that Mr. Day bought the estate property of the heir, pending administration; that he did not divulge to the heir, the information which he had of the value of the property, etc.

EVIDENCE:

The facts of alleged concealment and failure to divulge have been set out heretofore.

As to the pendency of the administration at the time of the purchase, the following facts are pertinent:

October 11, 1916—Decree of Final Distribution made and filed in the Probate Court of Shoshone County, Idaho; Mrs. Cardoner was represented by her attorney, John P. Gray, and his assistant Mr. McNaughton; the administrator was represented by his attorney, John H. Wourms;

October 14, 1916—Actual possession of property was delivered to Mrs. Cardoner; the administrator settled with her; she appointed Allen as her agent; and notified E. R. Day and John H. Wourms thereof;

October 14, 1916—Allen, as agent for Mrs. Cardoner, checked E. R. Day's administrator's account (Allen, pp. 595 to 599);

October, 16, 1916—Mrs. Cardoner discussed the sale of her interests with her agent, Allen, for the first time (Allen, pp. 599-600), and asked Allen if he would see what he thought she could get for it; she told Allen she thought Gene Day might buy it (p. 600—bottom).

Thereafter, Allen got Day's receipt (Exhibit No. 13, p. 1185), and discussed the sale with him, (Allen, pp. 602 to 604);

October 21, 1916—Allen saw Mrs. Cardoner and told her what Day had offered, and discussed getting a higher price for her interest, (pp. 604 to 606), and advised her to consult with Paulsen and Hutton, (p. 606);

October 25. 1916—Certified copy of Decree of Distribution recorded with County Recorder;

From October 21 to 27, 1916—Allen saw Mr. Day several times and demanded one-sixteenth of $6,000,000.00 for the Cardoner interest; Day refused to buy the interest for that sum, telling Allen when he made his last offer that he (Day) was through to offer it to someone else.

E. R. Day, pp. 736-737-804;
Allen, pp. 604-605; 610; 616-617;

October 27, 1916—Mrs. Cardoner came to Wallace (Allen, p. 611), and saw her agent, Allen, who told her—"Itold her that I had put the proposition up to Mr. Day on a $6,000,000.00 basis and he 'absolutely refused' to consider it." (p. 616).

Mrs. Cardoner and Allen then fixed the final

price (p. 617), but thereafter, the Burke property was raised $5,000.00 (pp. 618-619) at Mrs. Cardoner's express request (pp. 618-619);

October 28, 1916—Option contract and deed made; payment of $50,000.00 on contract accepted by Mrs. Cardoner. This was to be forfeited in case the purchase was not completed;

October 29, 1916—At the Old National Bank in Spokane, Washington, Mrs. Cardoner paid Allen $5,000.00 as his commission without denying that he was her agent.

Vincent, p. 698-702;

Allen, pp. 662-664;

November 1, 1916—Formal order of discharge of administrator duly entered;

November 14, 1916—Balance of purchase price ($320,000.00) paid.

INNOCENT PURCHASERS.

Harry L. Day and Jerome J. Day assert that they had nothing to do with the transaction until after the deal was closed; that they bought their interest between October 28, 1916, and November 14, 1916, paying in cash therefor. They borrowed the money from the Anglo & London-Paris National Bank of San Francisco, giving a note signed by themselves and E. R. Day, dated November 14, 1916.

Harry L. Day, pp. 963 to 982;

Jerome J. Day, pp. 1003 to 1004.

The reasons Eugene R. Day considered the purchase of the Cardoner minority interests were, to obtain control of the majority interest in the mine, to protect the large interests in

the properties which the Days already owned, to exclude any foreign, adverse interests and to preserve the friendly partnership.

Allen, pp. 604 (top)-610;
E. R. Day, pp. 797 (middle)-809 (middle).

When Harry L. Day and Jerome J. Day agreed to purchase part of the former Cardoner interest from E. R. Day and Eleanor Day Boyce, these same considerations controlled them, as they thought the price too high.

Harry L. Day, pp. 975-976-977;
Jerome J. Day, pp. 1005-1013.

The deeds to both Harry L. Day and Jerome J. Day were dated the —— day of December, 1916, acknowledged by Eleanor Day Boyce, January 5, 1917, and by Edward Boyce, April 5, 1917, and recorded April 9, 1917 (p. 967).

THE COURT'S FINDINGS.

From the decision (pp. 1373-1401), we quote the following:

MRS. CARDONER'S BUSINESS ABILITY.

"The plaintiff was not an ignorant, unsophisticated woman, nor was she without knowledge of the mining business. While her speech is marked by a strong foreign accent, she is not without facility both in using and understanding our language. She has not lived a cloistered life, nor does she give the impression of being by nature abnormally trustful or confiding. She is fairly well educated, to say the least, and has the poise and self-reliance which comes from travel and the rigorous experiences of a pioneer life. In short, I would think that in any ordi-

nary business transaction she could not easily be deceived or overreached. (P. 1382)."

"With much alacrity, I thought, and with unnecessary frequency, the plaintiff, in testifying, sought to give the impression that she knew nothing about business customs in general or about her husband's business or the Hercules mine in particular. (pp. 1386-1387). * * * It is difficult to avoid the belief that she was measurably familiar with these monthly statements, and was able to interpret them in their main features. Plainly she is not without some aptitude for, and experience in, business matters. She seems to have been careful and methodical, and even exacting, in respect to other transaction brought into evidence. She was quick to discover apparent discrepancies and inconsistencies in the administrator's accounts, and proceeded in an intelligent way to procure explanation and rectification. She kept a diary with unusual care, required receipts for disbursements, and altogether made inquiries and gave directions, not in the language of an unsophisticated woman, but in terms signifying that she was not a stranger to business transactions. (pp. 1387-1388.)"

ALLEN'S AGENCY.

"In bringing about the sale, Allen undoubtedly acted as the plaintiff's agent, and the few circumstances which upon their face were perhaps sufficient to warrant suspicion of collusion are satisfactorily explained. Allen was not in the employ of Day or his sister, nor did he act in concert with or at their suggestion. I am convinced that he endeavored to get as high a price as possible. (p. 1374.)"

"He made no misrepresentation of facts, and laid

before or discussed with her only possibilities which furnished legitimate subjects for consideration. Moreover, I am satisfied that at no time did the plaintiff entertain the view that he was representing Day's interest rather than her's. (p. 1375.)"

"In respect to all other matters, as appears from the letters in evidence, he seems to have been painstaking and to have protected her with the most scrupulous care. His apparent candor and directeness as a witness left no doubt in my mind of his good faith, and besides, to take the plaintiff's view is necessarily to accept the wholly improbable theory that not only Day and Allen, but the latter's aged father-in-law, a state district judge, with whose family the plaintiff had long been upon terms of intimate friendship, and his wife, had entered into a conspiracy to defraud her. I have no hesitation in dismissing this charge. (pp. 1375-1376.)"

EUGENE R. DAY AS ADMINISTRATOR.

A. October 14, 1916, the estate was duly distributed to Mrs. Cardoner. (p. 1377.);

B. The final decree of distribution was recorded at the office of the County Recorder of Shoshone County, Idaho, October 25, 1916. (p. 1377.);

C. "The order formally closing the estate and discharging Day from further responsibility was not entered until November 1, 1916, but this fact, upon which the plaintiff chiefly relies to support her contention, is thought to be unimportant. (p. 1377.)"

D. "The administration here was technically closed, and Day discharged as administrator, upon November 1st. Thereafter admittedly he had the capacity to purchase, and

from that time on for two months, the plaintiff stood upon the contract of sale. After November 1st she accepted the larger part of the purchase price, and, by such acceptance and her failure to object or protest, approved the transaction and authorized the escrow holder to deliver the deed. Indeed, if I have correctly read the record, never was this objection raised or suggested by her until urged by counsel in the oral argument at the close of the trial. It would be necessary, therefore, to hold that she acquiesced in and ratified the transaction, even were the view taken that the original agreement was made when Day was under disability to contract by reason of the estate not having been formally closed. * * * I do not hold that the comparatively short delay necessarily constitutes laches or estoppel. But by actively participating in the consummation of the unexecuted agreement, after such disability as Day may have had was removed, she directly confirmed the sale. (pp. 1380-1381.)" and,

E. At pp. 1378-1379, (referring to the actual delivery of the estate on October 14, 1916, after making the final decree of distribution), we find:

"The property distributed is no longer a part of the estate entrusted to the care of the administrator. Touching it, both his rights and his obligations are at an end. * * * In the absence of such petition (petition for partition—meaning) the property not only ceases to be under the control of the administrator, but passes out of the jurisdiction of the court. * * * There is no pretension here that such petition was filed, or, indeed, that it was a case where it could be filed. Hence, when the decree of distribution was entered upon October 14th, not only did

Day lose control of the property, but it passed beyond the jurisdiction of the court."

EUGENE R. DAY AS MANAGER AND CO-OWNER.

At p. 1381, the Court asks this pertinent question:

"Finally, can a reason be found in the fact that Day was, and for a long time had been, the manager of the mine, for holding the sale voidable?"

He then sets forth the limitations of an agent in dealing with his principal's property.

At p. 1382-1383, he reviews Mrs. Cardoner's business ability, residence in Spain, her husband's activities, etc., with which she had a measure of familiarity; the fact that she broke her husband's will; her return from Spain, and at p. 1384, considers her residence in Spokane and the ease of communication between Spokane and Wallace, and says:

"(P. 1384.) Immediately upon arriving at Spokane she communicated by telephone with Day at Wallace, and by appointment visited him there, at the offices of the company, two days later. Upon at least three other occasions prior to the distribution of the estate, twice in August, she conferred with him there. He is insistent that she came to his office and discussed the affairs of the company with him at least a dozen times. But inasmuch as she may have spent several days at Wallace upon a single visit, the apparent conflict in the testimony may be reconciled by assuming that she went to the office more than once during each visit."

"(P. 1385.) In substance her contention is that he made no disclosures at all, but repeatedly put her off, generally with the excuse that he had no time. Upon the other hand, he very positively testifies that again

and again he explained truthfully and in detail the status of the property, and advised her of what has been done and what they were planning and expecting to do. With equal emphasis, too, she makes the specific contention that she did not learn that the company had engaged in the smelting or refining business until she read about it in a mining journal, in November, 1916, after she had gone to New Mexico. Upon this point I am wholly unable to give her testimony credence."

After analyzing the situation, the court says:

"(P. 1386.) But if we put aside these considerations, we find that in the monthly statement of the company for February, 1916, which admittedly she received soon after coming to Spokane, there is shown a large expenditure on account of the smelter. Day testified that at their first conference she told him that her husband had been opposed to going into the smelting business, and questioned him about it. Allen testified that immediately after the decree of distribution, in conversation with him about the mine, she discussed the new smelter and refinery. Paulsen, a disinterested witness, testified that when she called upon him in October, shortly before the sale, and inquired why certain dividends had been passed, he explained 'that the Hercules had gone into the smelter business and branching out, and that they had to build up a reserve to take care of these additional business propositions, and also that we had a large amount of ore in transit to the smelter, which had not then been settled for.' And he also sought to quiet her apparent agitation over a newspaper report to which she directed his attention, to the effect that the "Guggenheims or the Amer-

ican Smelting & Refining Company * * * were going to absorb all of the Day interests in the Coeur d'Alenes, and smelters and everything they had." ' "

At pp. 1386-1387;

"With much alacrity, I thought, and with unnecessary frequency, the plaintiff, in testifying, sought to give the impression that she knew nothing about business customs in general or about her husband's business or the Hercules mine in particular. Admittedly her husband regularly received the monthly statements which the company had long been accustomed t osend to its members, upon which were shown not only the summarized items of operating receipts and disbursements for the month, but the aggregate of all dividends paid during the entire life of the mine. * * * (P. 1387.) according to appointment, she went to Wallace two days later, she answered, 'To see Mr. Day and ask him for the statements. Since Mr. Cardoner died he never sent us any more statements, and I went up to ask him for the statements.' "

"(P. 1387.) It is difficult to avoid the belief that she was measurably familiar with these monthly statements, and was able to interpret them in their main features. Plainly she is not without some aptitude for, and experience in, business matters. She seems to have been careful and methodical, and even exacting, in respect to other transactions brought into evidence. She was quick to discover apparent discrepancies and inconsistencies in the administrator's accounts, and proceeded in an intelligent way to procure explanation and rectification. She kept a diary with unusual care, required re-

ceipts for disbursements, and altogether made inquiries and gave directions, not in the language of an unsophisticated woman, but in terms signifying that she was not a stranger to business transactions."

"(P. 1388.) It is not a case where the principal is at distance and wholly dependent upon the information furnished him by his agent or associate, or is a stranger with no one to whom to turn for assistance or advice. The company's mill was within a few moments' walk from the offices at Wallace, and the mine a few moments' ride upon the train or by automobile. They were at all times accessible and open to the plaintiff; and so were the books and records of the company. Of this there is no question."

The court then discusses her ability to have employed agents; that she did employ attorneys, and says:

"(P. 1389.) For Day to have repeatedly denied her information about the Hercules would have been a flagrant violation of his duty both as manager and as administrator, on account of which the plaintiff might very reasonably, and I think would, have been deeply offended. Yet so far as appears she made no complaint to her friends or to her attorney, nor did she suggest criticism of him as manager to her associate owners, Palusen and Hutton. Instead she seems to have continued to hold him in high esteem, and to entertain for him a friendly feeling, until, after going to New Mexico in December, she was advised by her attorney from the east, (acting in perfect good faith, I doubt not), that upon inquiry he believed that the price she had received was inadequate."

"(P. 1389.) Furthermore, if we credit her story, we must also believe that, without suspicion or resentment against him, notwithstanding the ill treatment which she now charges at his hands, upon five days consideration she sold to Day the very property concerning which he had persistently denied her information, and upon representations chiefly made by Allen, whom she looked upon as Day's agent. However tenderly we may regard her rights by reason of her sex and widowhood, we cannot give credence to the incredible."

("P. 1389.) From the whole record I am convinced that from the beginning she was aware of the smelting enterprise, and was concerned about it. The mine had been shut down for some length of time in 1915, because of the smelter controversy."

At pp. 1390-1391, the court considers many phases bearing upon the smelter enterprises and at p. 1391, says:

"By her testimony she gives the impression that Allen and Judge Woods and his wife made misrepresentations from which it would follow that the property, if not practically worked out, had only a speculative value, and yet for such a property, Day, its manager, was admittedly making an offer based upon a value of $5,000,000.00, a price in excess of anything ever paid or offered for any interest in the mine before. If, as apparently she would now have us believe, she became panic stricken and by Allen and her other friends was induced to believe the property was practically worthless, did she think that in receiving at the rate of $5,000,000.00 from Day, she was overreaching or getting the best of him?"

At pp. 1391-1392, the court discusses various matters re-

lating to alleged misrepresentations to Mrs. Cardoner, and says:

> "(Pp. 1392-1393.) Paulsen, whose intelligence and good faith there is no reason to question, testifies that when she called upon him a few days before the sale, he told her that 'there was a good deal of guess work connected with fixing the price of the mine in the state of development that the mine was in at that time'; that they were behind with their developments, their shaft from the Hummingbird tunnel was not started early enough, and that the ore reserves above the tunnel was getting pretty low, and that at that time they 'did not have such an awful lot of ore exposed or developed.' Indeed no one described the physical condition of the property more conservatively or gave more prominence to the uncertainties involved in making an estimate of the value of the mine than Paulsen, and yet at the same time he told the plaintiff that his interest was not for sale, thereby intending to convey the meaning that he regarded the mine as a good property; and the plaintiff admits that she understood him to advise her to hold on to her interest."

At pp. 1393-1394-1395-1396, the court carefully considers various elements showing the difficulties and uncertainties in fixing values of mining properties, and says:

> "(P. 1396.) So the ultimate question is not what she might have made out of it if she had chosen to retain it, but what it was worth, what it could have been sold for outright. * * * Nor, of course, does the inquiry

here relate to (p. 1397) the amount of ore that subsequent developments may disclose to have actually been in the mine. The mineral content of the mine is a material inquiry only because it is a matter to which both the owner and the prospective purchaser would give consideration. * * * Hence the question is not what the mine actually contained, but what, under the light then available, was a reasonable estimate of its content. Such estimate, of course, is only one of the important factors, and when we consider all of them we find that the margin of uncertainty is so great that any opinion of the value must be measurably speculative."

At pp. 1397-1398, the court considers various questions entering into the ultimate question of reasonable value, and at p. 1399, says:

"Day, though not an expert geologist or mining engineer, and perhaps without experience in marketing mines, was an intelligent, practical operator, with intimate knowledge of the general conditions in and about this property. His judgment is entitled to some weight, and I am satisfied that he would not have given more for the plaintiff's interest. Some point is made that he bargained with her and sought to secure the property for a much lower figure. But it is not material to the present inquiry to determine whether or not he had the right to deal with her as an equal, if it be assumed that she had all the information that he possessed. It might very well be held that if she knew as much about the mine as he, he had the right to buy her interest at such price as she was willing to take. But be that as it may, whether we

condemn or justify his conduct in seeking to get the property for less than he finally paid for it, the fact is that he added to his first offers until he reached the sum of $312,500, exclusive of the cash on hand, or a price upon the basis of $5,000,000.00 for the assets, exclusive of the cash on hand, and there declined to go further. Through Allen the plaintiff sought to get him to increase his bid, but Day definitely declined, and I think was unwilling to pay more."

"(P. 1400.) His testimony now as to what he considers the property worth, as well as that of his brothers, Harry L. Day and Jerome J. Day, is in the nature of expert testimony, and, coming from an interested source, is, of course, to be considered in the light of such interest. But if for that reason we put aside entirely their opinion testimony, and impute to that of the opposing engineers equal weight, what have we? We have Day's decision at the time not to pay more. We have the testimony of the two disinterested witnesses Paulsen and Hutton, the one that the property was worth no more than was paid, and the other that it was worth less. We have no instance where a larger price was ever paid or offered for any interest in the property. We have the sale of the Reeves one-sixteenth interest seven or eight years before, when undoubtedly the actual value was greater than in 1916, for $250,000. We have the unaccepted offers of the owners to sell the whole property in 1905 for $4,000,000 and in 1906 for $6,000,000. If it be said that to Day the interest had a special value because it gave 'the Days' control of the mine, the obvious reply is that to an independent investor, generally speaking, so small an in-

terest would be less salable, and that therefore its market value, when offered alone, could hardly be said to be equal to one-sixteenth of the market value of the property as a whole."

The court concludes:

"(Pp. 1400-1401.) Upon consideration of the entire matter, my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, and in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required."

"(P. 1401.) From these considerations it follows that the bill must be dismissed, and such will be the decree."

ERRORS ASSIGNED BY APPELLANT.

At pp. 1403-1410, the appellant specifies ten errors. Briefly, they are as follows:

Error No. I (pp. 1403-1404):

> Involves the reception of option purchase contracts in evidence.

Errors No. II (p. 1405), III (p. 1406), IV (pp. 1406-1407), and V (pp. 1407-1408):

> Are predicated upon the relation existing between Mrs. Cardoner and Eugene R. Day as managing partner and co-owner.
>
> They charge generally that Day was co-owner and general manager of the partnership for

years; Mrs. Cardoner had nothing to do with the management, but was residing in Spain until a few months previous to the sale; that Eugene R. Day was familiar with the partnership business and possessed of and had access to all obtainable information relative to the value of the property; that Day communicated no information to plaintiff with reference thereto; that at the time of the said sale plaintiff did not possess information necessary to form a sound judgment as to its value.

Error No. II says:

A. That the information she had from Day and otherwise was not all the information possessed by him; and,

B. That the price paid for the property did not approximate nearly its real value and was grossly inadequate.

Error No. III charges:

That the consideration given by Day to plaintiff was grossly inadequate and was known so to be by Day and not known to be inadequate by plaintiff.

Error No. IV says:

That the evidence does not show that the price given for the property approximated reasonably near the value thereof.

Error No. V alleges:

That the evidence does not show that all the information in Day's possession which was

necessary to enable Mrs. Cardoner to form a sound judgment of the value of the property was imparted by Day to her prior to the purchase or that at said time she possessed said information.

Errors No. VI. (p. 1408), and VII (pp. 1408-1409):

Assert that Eugene R. Day was administrator, etc., at the time of such purchase and that the purchase of the mining property (Error No. VI) and of the Burke property (Error No. VII) were alike prohibited by Section 5543, R. C. of Idaho.

Error No. VIII (p. 1409):

Challenges the evidence as insufficient to sustain the court's finding that Mrs. Cardoner was informed of the known conditions and facts bearing upon the value of the property at the time of sale.

Error No. IX (p. 1409) says:

The evidence is not sufficient to show that the price Eugene R. Day paid for plaintiff's interest in the mining company's property approximated the reasonable market value thereof.

Error No. X. (p. 1409):

Assails the entire transaction and asserts that fiduciary relations existed between Day and Mrs. Cardoner; and that Day did not impart to her information possessed by him from which she could have judged approximately

near the value; and that Jerome J. Day, Harry L. Day and Eleanor Day Boyce were not innocent purchasers.

It will be noticed that appellant does not challenge the findings of the court on the following questions:

A. Mrs. Cardoner's business ability, aptitude and experience;

B. That she recited her family troubles to Day and Allen;

C. That Allen was Mrs. Cardoner's agent;

D. That he made no misrepresentations to her; that Allen never acted for any of the Days nor in conjunction with them;

E. That the price paid for the Burke property was in excess of its value; and

F. That her estimated one-sixteenth of the cash on hand was in excess of the true amount.

POINTS AND AUTHORITIES.

POINT I.

Findings which are unchallenged on appeal are conclusive.

Rule 11—this court.

3 Corpus Juris, p. 1330, text and note 44, (cases).

3 Corpus Juris, p. 1333, Section 1463.

Wallace Wood, Jr., Trustee v. Lumber Co., 226 U. S. 384; 33 S. C. 125 (syllabus, Par. 1).

Briscoe v. Rudolph, 221 U.S. 547; 55 L. 848 (850).

See argument—post, pp. 82-83

POINT II.

Binding, concluded option purchase contracts, voluntarily

made are admissible as evidence tending to show the value of the property involved. They differ from mere unaccepted offers to sell.

Fenerstein v. The U. S. ("Fenerstein's Champagne"), 3 Wall. 145; 18 L. 121.

Virginia v. West Virginia, 238 U. S. 202; 35 S. C. 795 (800), (the options were received in evidence. We are now concerned simply with their weight.)

15 Cyc. 304.

16 Cyc. 1135 (1136, text and note 64).

McLean v. Clark, 47 Ga. 24.

Gatling v. Newell, 9 Ind. 572.

G. H. & S. A. R. R. Co. v. Davis, White & Wilson's Repts. (Tex. C't. Ap.) Vol 1, Sec. 147, bot. page 58.

Thurber v. Thompson, 21 Hun. 472.

Moore v. Devoe, 22 Hun. 208.

Rawson v. Prior, 57 Vt. 612.

Hotchkiss v. Germania Fire Ins. Co., 5 Hun. 90.

Harrison v. Glover, 72 N. Y., 451.

Cliquot's Champagne, 3 Wall. 143.

Geohegan v. R. Co., 266 Ill. 482; 107 N. E. 786.

Park Dist. v. Hedenberg, 267 Ill., 588; 108 N. E. 664.

Sanitary Dist. v. Baumbach, 270 Ill., 128; 110 N. E. 331.

Germ. Am. St. Bank v. Spk-Col. R. R. & N. Co., 49 Wash. 359; 95 Pac. 261;

Rottleberger v. Henley, 155 Iowa, 638; 136 N. W. 776.

Faust v. Hosford, 119 Iowa, 97; 93 N. W. 58.

Clausen v. Tjernagel, 91 Iowa, 285; 59 N. W. 277.
N. A. Tel. Co. v. N. P. Ry. Co., 254 Fed. 417 (418).
Joy v. Ins. Co., 83 Iowa 12; 48 N. W. 1049.
See argument post, pp. 78. to 80.

POINT III.

A transaction cannot be assailed on the ground of breach of alleged fiduciary relations where the complaining party conducted an independent investigation, acted through her own agent, consulted her friends and did not rely upon the fiduciary to furnish information.

Colton v. Stanford, (Cal.) 23 Pac. 16, (pp. 21-22).
Curran v. Smith, 149 Fed. 945 (3rd C. C. A.) affg. 138 Fed. 150 (156-158).
Pittsburg L. & L. Co., v. Northern C. L. Ins. Co., 140 Fed. 888 (893—bottom), (cases collated).
Palmer v. Shields, 128 Pac. 1051.
Blank v. Connor, (Cal.) 141 Pac. 217, (p. 220, last paragraph).
Kinne v. Webb, 54 Fed. 34 (Point II, p. 39) (8th C. C. A.).
Littell v. Hackley, 126 Fed. 309, (6th C. C. A.)

Likewise, where concealment is the ground of action, it must appear that plaintiff relied upon defendant to make disclosure of the fact concealed, and that the concealment was a moving inducement to the plaintiff's change of position.

The concealment, misrepresentation or non-disclosure must be intentional.

14 Am. & Eng. Ency. of Law, Second Edition, p. 69.
Colton v. Stanford, 23 Pac. 16 (syllabus Point I).

In such a case the question is, "what did the trustee con-

ceal," and not "what would a search by him have disclosed." The trustee is not compelled to search for facts which he does not know, nor to express his opinion; his duty is discharged when he gives the information which he has.

Richardson v. Heney, 157 Pac. 980.

Even where the relation is trustee and beneficiary reliance must be alleged and shown.

Burke v. McGuire, 98 Pac. 21 (25), (right hand column at bottom), and on rehearing, p. 26.

See argument post, pp. 80. to 115.

POINT IV.

The trust relationship between administrator and heir is fully terminated when the final account has been approved, the decree of final distribution made and entered in the Probate Proceedings, possession of the trust estate delivered to the heir and certified copy of the decree of final distribution is recorded in the Recorder's office.

Wheeler v. Bolton, 54 Cal. 302.

Norfew v. San Francisco & S. R. R., 44 Pac. 810 (812-813).

Moore v. Lauff, (Cal.) 158 Pac. 557 (559).

Buikley v. Superior Court, (Cal.) 36 Pac. 360.

See argument post, pp. 143. to 147.

POINT. V.

The rule prohibiting an executor from purchasing property of the estate at a sale made by such executor, does not prevent the executor from purchasing the estate by direct dealing with the heir after the decree of final distribution has been recorded. Unless it shall appear from the evidence that the executor did not make full disclosure to the seller and did

not pay a consideration approximating a fair price for the property.

R. C. Idaho 5543.

Werner's American Law of Administration, 2nd Ed., Vol. 2, Sec. 487, pp. 1085-1086.

State v. Jones, 131 Mo. (S. C. 33 S. W. 23).

Vol. I, Perry on Trusts, 6th Ed. Sec. 205.

Vol. I, Black on Recission & Cancellation, p. 114, Sec. 46.

Mills v. Mills, 57 Fed. 873 (878-879—per Gilbert, Circuit Judge).

Golson, et ali, v. Dunlap, (Cal.) 14 Pac. 576 (578-579).

Haight v. Pearson, (Utah) 39 Pac. 576.

French v. Phelps, (Cal.) 128 Pac. 772.

Littell v. Hackley, 126 Fed. 309 (6th C. C. A.).

Kinne v. Webb, 54 Fed. 39 (8th C. C. A.).

See argument post, pp. 142 to 147

POINT VI.

Parties who deal with and calculate the chances of value of property of speculative and doubtful value, are bound by their transactions unless there is an element of misrepresentation, culpable concealment, or other like conduct amounting to actual or constructive fraud.

Colton v. Stanford, 23 Pac. 16 (24-25).

Pomeroy's Equity, 4th Ed., Vol. 2, Sec. 855, pp. 1745-1746.

Tabor v. Piedmont Heights Bldg. Co., 143 Pac. 319-320.

Cleveland Cliffs Iron Co., v. East Itasca Mining Co., (8th C. C. A.) 146 Fed. 232 (syllabus Point

4) (p. 236 et seq.), quoting from U. S. v. Barlow, 137 U. S. 271 (281); 10 Sup. Ct. 77; 33 L. 346, and collating authorities.

See argument post, pp. 80 to 117.

POINT VII.

Mining properties are necessarily of speculative value, and transactions concerning them cannot be set aside for inadequancy of consideration where the price paid is a fair approximation to its value rather than the full value of such property.

Brooks v. Martin, 2 Wall. 73.

Patrick v. Bowman, 149 U. S. 44.

Richardson v. Heney, (Ariz.) 157 Pac. 980.

Colton v. Stanford, 23 Pac. 16 (24-25).

The laws of the mining states almost unanimously recognize the difficulty of ascertaining the value of mining property, and provide, therefore, for taxing the actual output of the mines, rather than to undertake to ascertain the value and assess the property upon the value thereof.

Foster v. Hart Cons. Mining Co., 122 Pac. 48 (50).

Reding & P. R. R. Co. v. Balthazar, 13 Atl. Reports, 294 (297).

Southern Development Company v. Silva 125 U. S. 247; 31 L. 678; 8 S. C. 883.

Gordon v. Butler, 105 U. S. 553; 26 L. 1166.

Biwabek Mng. Co. v. U. S. 242 Fed. 9 (16).

Doyle, Internal Revenue Collector v. Mitchell Bros., 235 Fed. 686 (691).

Fred Von Baumach, Collector of Internal Revenue, v. Sargent Land Company, 242 U. S. 503; 37 S. C. 201 (208).

Hodgins vs O'Connor 191 U. S. 237-246

Handley v. Federal Mng. & Smltg. Co., 235 Fed. 769 (771-773-774-777).

See argument post, pp. 117. to. 118.

ARGUMENT.

Considering the several errors assigned, these appellees contend:

ERROR No. 1 (pp. 1403-1404).

At the trial, while Witness Eugene R. Day was testifying on direct examination (pp. 756-758), and over the objection of the plaintiff (pp. 757-758), the witness testified that in 1905, the Days, Mr. Cardoner and Mr. Rothrock gave an option purchase contract to Mr. Adams of all their interests, basis $4,000,000.00; and also that in 1906, the entire mine was optioned to J. P. Graves for $6,000,000.00, and witness Folsom (pp. 885-890) gave like testimony to which no objection was made.

The Adams option contract is Exhibit 52, pages 1312-1319.

J. P. Graves paid $20,000.00 (p. 888), and John B. Adams paid $625.00, as part purchase price (p. 1314), and, thereafter each dropped his respective option.

This evidence was admissible to show the reasonable, probable value of the mine as the contracts there referred to were not mere offers to sell, but were concluded agreements binding the owners to sell and the purchaser to buy at the price named, subject only to the will of the purchasers.

This evidence was received and the sole question for consideration is its weight and not its admissibility.

In Virginia v. West Virginia, 238 U. S. 203, 35 S. C. 795 (800), certan newspaper quotations of the value of stocks

in the early sixties were received in evidence. The court says:

"The quotations referred to appeared in the 'Richmond Dispatch,' a newspaper of high reputation, and embraced reports of sales by brokers of good standing. It is unquestioned that, in proving the fact of market value accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence. Cliquot's Champagne, 3 Wall, 114, 141, 18 L. ed. 116, 120; Fennerstein's Champagne (Fennerstein v. United States) 3 Wall. 145, 18 L. ed. 121; Chaffee v. United States, 18 Wall. 516, 542, 21 L. ed. 908, 912; Sisson v. Cleveland & T. R. Co., 14 Mich. 489, 90 Am. Dec. 252; Cleveland & T. R. Co. v. Perkins, 17 Mich. 296; Whitney v Thacher, 117 Mass. 523; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522; State ex rel. Moseley v. Johnson, 144 N. C. 257, 56 S. E. 922, 929; Nash v. Classen, 163 Ill. 409, 45 N. E. 276; Washington Ice Co. v. Webster, 68 Me. 449; Harrison v. Glover, 72 N. Y. 451. We need not stop to review the decisions that are cited with respect to the extent of the preliminary showing of authenticity that is required (Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Norfolk & W. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522) inasmuch as all the quotations asserted to have any bearing were received in evidence by the master. We are now simply concerned with the question of their importance or weight, and whether they can be deemed to have the controlling effect that is sought to be ascribed to them."

N. A. Tel. Co. v. N. P. R. Co., 254 Fed. 417 (418 says:

> "To prove market value when it is used in this secondary or figurative sense, it is proper to receive evidence of individual transactions, even offers made in good faith for property of like character, the nature of the property, its location, its rental value, the uses to which it can be put, and all the manifold elements which are admissible to show the far and reasonable value of property which is not so traded in as to give it a market value in the primary sense of the term."

In over-ruling plaintiff's objection to these options when offered as evidence, Judge Dietrich said:

> "(P. 758.) THE COURT. The objection will be overruled. While for some purposes an option is not receivable, of course in evidence, it is indicative of the estimate in which the owners of the property held it. It is like an offer to sell. That would indicate the attitude of the owner of the property."

Upon the above authorities as well as those cited under Point 11, this brief, we submit that no error was committeed in the reception of this evidence, as on the question of good faith, the options show that Day paid Mrs. Cardoner more for her one-sixteenth interest than the co-owners had asked for their interests when the mine was from 10 to 12 years younger than at the date of the transaction in question.

ERRORS No. II (p. 1405), III (p. 1406), IV (pp. 1406-1407), V (pp. 1407-1408) and X (p. 1409).

These various errors will be considered together as they

all relate to the same matters. They charge generally as follows:

That Day was co-owner and general manager of the partnership for years; Mrs. Cardoner had nothing to do with the management, but resided in Spain until within a few months of the sale; Day was familiar with the partnership business and possessed of and had access to all obtainable information relative to the value of the property; that Day communicated no information to plaintiff with reference thereto; that at the time of said sale plaintiff did not possess the necessary information to form a sound judgment as to the value of the property;

Error II says that the information she had from Day and otherwise was not all the information possessed by him;

Error V says that the evidence does not show that all the information in Day's possession, which was necessary to enable Mrs. Cardoner to form a sound judgment of the value of the property, was imparted by Day to her prior to the purchase or that at said time she possessed said information;

Error X says that Day did not impart to her information possessed by him from which she could have judged approximately near the value of the properties;

Errors II, III and IV charge that the consideration was grossly inadequate; was known to Day to be inadequate; that Mrs. Cardoner did not know its inadequacy; and the evidence fails to show that the price given for the property approximated reasonably near its value.

In considering the matters embraced within these errors we believe the court should keep in view the false charges in the complaint respecting Harry R. Allen, all of which

were resolved against Mrs. Cardoner; that appellant has not assigned a single error respecting any matter wherein Allen was involved by such charges; and to remember the assault upon, and false allegations concerning him, found at Paragraphs V and VI, pp. 13-20 of the complaint.

We bring these matters to the court's attention here and now to demonstrate Mrs. Cardoner's mental attitude and the reckless manner in which she accused various persons of wrongs of which they were innocent; and also to emphasize her aptitude for error and misstatement.

She described herself as an unsophisticated, ignorant woman, unskilled in business or the ways of the world, and incompetent to look after her own affairs.

FINDINGS UNCHALLENGED.

Among the very material facts found by the court which are not challenged on the appeal are the following:

A. Mrs. Cardoner's business ability, alertness, education, aptitude and experience; her willful misrepresentation that Allen was Day's agent; and that she knew nothing of her husband's affairs; her adroitness and evasiveness as a witness and her alacrity and unnecessary frequency in attempting to create the impression that she knew nothing of business customs in general or the Hercules mine in particular;

B. Her repeated visits and consultations with her own friends and other co-owners besides Day, and her agent, Mr. Allen, during this transaction, and her attorney, Mr. Gray, during the administration;

C. That Allen was her agent and not the agent of the Days; that he made no misrepresentations to her; but acted in good faith toward her; that he was not incited by the

Days, and did not act in collusion with them; that he obtained the highest possible price, and used utmost good faith in her business transactions;

D. That Mrs. Cardoner was not in an agitated state of mind because of any false representations by Allen or other persons; that she had troubles with her family in Spain.

We ask that these rules of law be kept in mind,

FIRST. Findings which are unchallenged are conclusive.

> Rule 11—this Court.
>
> 3 Corpus Juris, p. 1330, text and note 44 (cases).
>
> 3 Corpus Juris, p. 1333, Section 1463.
>
> Wallace Wood, Jr., Trustee v. Lumber Co., 226 U. S. 384; 38 S. C. 125 (syllabus, Par. I).
>
> Briscoe v. Rudolph, 221 U. S. 547; 55 L. 848 (850);

SECOND, "A finding of fact made by the trial court on conflicting evidence is presumptively correct and will not be disturbed in the absence of serious mistake in the consideration of the evidence or error in the application of the law."

> G. N. Ry. Co. v. Pa. & R. C. & I. Co., 242 Fed. 799 (syllabus Point 2).

We have heretofore shown the testimony of Mr. Day relative to the numerous conversations which he had with Mrs. Cardoner from April 19, 1916, to the time he delivered actual possession of the estate to her on October 14, 1916. See Statement of Facts, subject, Confidential Relations, Paragraphs Nos. III, XII and XIII.

At pp. 1384-1385, the court says:

"Unfortunately upon the important question of what information relative to the mine Day gave her, the direct evidence, consisting almost exclusively of the testimony of the two parties most concerned, is highly conflicting. In substance her contention is that he made no disclosures at all, but repeatedly put her off, generally with the excuse that he had no time. Upon the other hand, he very positively testifies that again and again he explained truthfully and in detail the status of the property, and advised her of what had been done and what they were planning and expecting to do. With equal emphasis, too, she makes the specific contention that she did not learn the company had engaged in the smelting or refining business until she read about it in a mining journal, in November, 1916, after she had gone to New Mexico. Upon this point I am wholly unable to give her testimony credence."

At pp. 1385-1389, the court discusses various facts, and at p. 1389, says:

"However tenderly we may regard her rights by reason of her sex and widowhood, we cannot give credence to the incredible. From the whole record I am convinced that from the beginning she was aware of the smelting enterprise, and was concerned about it."

At pp. 1390-1391, the court continues the discussion, and at p. 1391, says:

"If, as apparently she would now have us believe, she became panic stricken and by Allen and her other friends

was induced to believe the property was practically worthless, did she think that in receiving at the rate of $5,000,000.00 from Day, she was overreaching or getting the best of him?"

At pp. 1391-1393, the court continues his discussion of the testimony, and at pp. 1392-1393, says:

"Indeed no one described the physical condition of the property more conservatively or gave more prominence to the uncertainties involved in making an estimate of the value of the mine than Paulsen, and yet at the same time he told the plaintiff that his interest was not for sale, thereby intending to convey the meaning that he regarded the mine as a good property; and the plaintiff admits that she understood him to advise her to hold on to her interest."

At pp. 1393-1396, further facts are considered by the court, and at pp. 1395-1396, we find:

"Besides—and I think this consideration had much weight with her, regardless of its merit or want of merit in point of law—she was not without fear that the legatees named in her husband's will would seek to assert rights thereunder, and she reasoned that such a contingency was much less likely to happen or to turn out adversely to her if she disposed of all her interest in the specific property of the estate. Upon the whole, I do not think it can be held that under the known conditions her decision to make a sale was precipitous or improvident."

At pp. 1396-1401, the court carefully considers the question of value, and at pp. 1400-1401, says:

"Upon consideration of the entire matter, my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source and in my view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required."

In appellant's brief, pp. 29-64, an attempt is made to set out the testimony of Eugene R. Day in narrative form. The argument is made that Mr. Day did not divulge all the information he had about the mine to Mrs. Cardoner.

Appellant fails to give due consideration to the following testimony:

WITNESS EUGENE R. DAY, pp. 726-727:

"Q. Well, what did she say as to that, as a business proposition, if anything?

A. Well, she didn't think that it was good business to tie up so much money, and so much ore in the business, in the smelting business, and she was quite doubtful about it. But I assured her that the business of the partnership was never healthier than it was at that time.

Q. Was there anything said about the condition of the mine, the future life of the mine below the Hummingbird tunnel?

A. She asked me my opinion, and I told her that if we had always had good ore all the way down, that the history of the country showed that the ore became

baser, but I had every reason to believe that large bodies of ore would be discovered in new development.

Q. What development was that, Mr. Day?

A. The development by the shaft, and below the No. 5 level of the Hercules property.

Q. Below the No. 5 tunnel?

A. Below the No. 5 tunnel.

Q. Was there any statement made in reference as to how deep it might go?

A. Yes, that was talked over.

Q. What was it?

A. She asked me how deep that I supposed it would go, and I told her no one knew that; that the best opinion we could have would be proved by the example of others who mined in the district close to that particular place.

Q. Well, did you go into the history of those in any way?

A. Well, I recited further my idea in the matter, and I told her it was my opinion at that time that the Tiger did not pay lower than the fifteen or eighteen hundred feet below the creek level."

And after detailing the work which had been done below the Hummingbird tunnel and his informing her thereof, he says:

"(P. 752). Q. What information did you have relative to the development of the Hercules mine below the Hummingbird tunnel that you did not impart to Mrs. Cardoner?

A. I gave Mrs. Cardoner a full account of all the operations that were going on.

* * *

Q. Did you at any of these conversations conceal from Mrs. Cardoner any information relative to this development work that I have asked you about?

* * *

A. No, I never concleaed anything from Mrs. Cardoner pertaining to that business.

* * *

Q. Did you misrepresent any facts relative to the Hercules property, the Hercules mine, or its development, to Mrs. Cardoner?

A. No, I did not."

"(P. 776.) Q. Tell us what you said?

A. I told her that we had encountered good ore in the 200 level in the August conversation, that the ore was not explored enough to tell how much was there, but it looked good."

"(P. 782.) Q. All right. What other questions did she ask in the spring conversation?

A. She asked the same subject matter in each conversation in substance.

Q. I understand that, but what did she ask?

A. She asked to be told all about the business, the refinery and the smelter, the ore in transit—

Q. She mentioned all of those things in her questions, did she?

A. She absolutely did.

Q. Did she frame one general question, such as you stated now?

A. Well, she didn't frame anything. It all took place in a conversation, a friendly conversation between Mrs. Cardoner and myself, and I don't think there was any framing."

WITNESS PAULSEN, at pp. 683-684-685-686:

Paulsen testifies to a conversation with Mrs. Cardoner about the Guggenheim rumor which he didn't believe, and says:

"A. * * * I told her I had seen the same article in the paper that she had evidently, and for her to disregard it, and that there was nothing to it. I told her that I did not believe the Guggenheims were after us, and that if they were, we were able to take care of ourselves against them, we were in good shape to do our business, and that they could not bother us any.

Q. Who did you refer to as 'we,' Mr. Paulsen?

A. Why, the partnership of the Hercules mine."

"(P. 684.) A. * * * And she asked me what I thought about her selling her interest to him, and I told her I didn't want to advise her because if I advised her to sell I might make a mistake, and if I advised her to keep it I might make a mistake, so I told her I thought my judgment would not be worth very much to her. I did not like to advise her. However, I said, my interest is not for sale, and that is about all that was said."

(P. 685.) He explained to her about there being no dividends for a few months, the building of the cash reserve, and also the ore in transit, etc.

"(P. 686.) A. * * * I told Mrs. Cardoner

very plain, that after I told her my interest was not for sale, I told her, 'But if you sell your interest, Mrs. Cardoner, you will have all the money you want, and you will have the same thing if you keep it.' "

"(P. 687.) Q. When you told her your interest was not for sale, what did you mean by that?

A. Well, I meant, that she might take a hint that it was a good thing, for her to keep her's."

WITNESS MRS. CARDONER, at pp. 355 et seq:

"Q. Will you tell us what you did, if anything, for the purpose of trying to get some information about it?

A. I went to Mr. Paulsen, the day after.

Q. Mr. Paulsen?

A. Yes.

* * *

Q. What did you say to him?

A. I asked him if that was true, that the Guggenheims want to buy that mine, and he said he don't think so, he think there is nothing in that."

"(Pp. 399 et seq.) Q. Mrs. Cardoner, you say that after Mr. Allen talked to you on that day you went to see Mr. Paulsen, the next day?

A. The next day, yes.

Q. Now, as nearly as you can recollect, please tell the court the substance of your conversation with Mr. Paulsen?

A. Oh, it wasn't much of a conversation.

Q. Did you talk about the Hercules mine?

A. Yes, I say a few—(p. 400)

Q. Did he talk about the Hercules mine?

A. Yes, I say a few—'Do you think the Guggenheims want to buy that mine?' And he say, 'I don't think so.'"

Q. What is that now?

A. He said he didn't think so.

Q. Who didn't want to buy it, the Guggenheims?

A. Yes, the Gugghenheims.

Q. Did you ask him how much the property was worth?

A. I didn't ask him how much the property was worth because I didn't sell the property.

Q. Did you ask his advice as to whether you should sell it?

A. I don't remember.

Q. What?

A. I don't remember. He said he would not sell it if it was him.

Q. He would not sell it if it was him?

A. Yes.

Q. He told you that, did he?

A. Yes. And when I went in Wallace, it was with the intention of not to sell.

Q. Mr. Paulsen told you he would not sell it, did he, if it was you?

A. No, if it was himself he would not sell it. He talked about him.

WITNESS HARRY ALLEN, at p. 600:

"Q. What did you discuss in addition to that on the trip to Spokane on the train?

A. We discussed her different interests, particularly the interest in the Hercules.

Q. What was said with reference to that?

A. She said that she was—first she said she wondered what she could get for her Hercules interest, and I told her then, said, 'You don't want to sell that interest, Mrs. Cardoner.' Well, she apparently was afraid that her son-in-law would come over here, etc."

"(P. 615-616). Q. Mr. Allen, was that the conversation at which you advised her to go and talk with Mr. Hutton and Mr. Paulsen, and her lawyer?

A. Yes, sir. I don't know whether I have testified to this or not, but either at that time or later on I asked her if it would not be a good idea for her to sell her share and leave Bertha's intact."

WITNESS HUTTON, at pp. 672-673:

Testifies to a conversation had with Mrs. Cardoner about six weeks before the sale.

"(P. 672.) Q. What was the conversation with reference to that?

A. She speaks in broken English, and I cannot understand her very well, but something was said in regard to the value of the property.

Q. Yes, who said it?

A. She spoke of the value, what I thought the value of it was.

Q. Yes.

A. And I told her that, taking everything into consideration, the depth of the mine, and all the equipment she had, smelting and concentrators, that I considered $4,000,000 was a good price for it.

Q. Mr. Hutton, did she ask you any reasons for your conclusions, or did you give her any?

A. Why, no, I don't remember of giving her any reasons more than this, that the mine was getting deep, and that we knew of some six mines within two or three miles of there that had played out, from 1800 to 2400 feet in depth, things like that, taken into consideration."

WITNESS MRS. CARDONER, at pp. 403-404:

Says she saw Mr. Hutton in April 1916, in his office.

"(P. 404.) Q. Did you discuss with him at that time the value of the Hercules mine?

A. No.

Q. Or of your interest in it?

A. No, he asked me, 'You are not going to sell?' and I say, 'Oh, no, I don't want to sell.'

Q. Mr. Hutton asked you if you wanted to sell?

A. Yes.

Q. That is when you first came back from Spain?

A. When I first came; and I say, 'No, I don't want to sell.'

Q. Was there any other discussion at that time?

A. No.

Q. Did you ask him what he thought the mine was worth at that time?

A. I didn't ask him that time. I never want to sell the mine. I didn't ask him how much it was worth. I wasn't in position to sell. All what I want to know is about my dividends, the dividends Mr. Day never sent me after I was there.

Q. You asked him, did you, about the dividends that it was paying at that time?

A. Mr. Day, yes.

Q. No, not Mr. Day, Mr. Hutton?

A. No, there was no discussion about that with Mr. Hutton.

Q. Did you say Mr. Hutton asked you if you wanted to sell your mine?

A. No, he says, 'You are not going to sell?' and I say, 'No, I ain't going to sell.' That is all.

She denies any discussion with him about October, 1916, but at pp. 406-407, after referring to her diary, she admits she saw Hutton on May 28, and again on October 29, 1916.

At pp. 408-409, she admits she wanted to see Mr. Hutton to learn what he would say about the mine.

We have heretofore shown that on October 14, 1916, after the property was turned over to Mrs. Cardoner, she notified Eugene R. Day and John H. Wourms that Allen would represent her, etc. Wourms, at pp. 957-960.

Allen's testimony, at pp. 610-622, is a complete recital of the transaction of sale showing her acquaintanceship with the various properties, her reasons for selling, his course of negotiations with Eugene R. Day, and Mrs. Cardoner's acquaintanceship with it, and that she fixed her own price after Day had refused to pay $6,000,000.00 and told them to sell elsewhere.

The above evidence conclusively establishes:

A. That Day gave Mrs. Cardoner all the information he had and concealed nothing from her;

B. That she employed her own agent and notified Day

thereof, and did not rely upon Day after October 14, 1916; and

C. That she made up her mind to sell and was not influenced by anyone in so doing, and employed her own agent and conducted her own investigations as to price, terms and conditions of sale.

NET PROFITS AND DIVIDENDS.

Appellant's brief, at pp. 45-52, says that Mrs. Cardoner never knew the difference between the net profits and the dividends; and charges are made that Eugene R. Day suppressed such information, and that had she been informed that a difference existed in these two items, she would not have made the sale. At p. 51, counsel says:

> "It is quite evident that he did not desire her to have the necessary information, etc."

And at pp. 45-48, much time is spent in calculations to show that this difference exists.

Counsel overlooks the following testimony from plaintiff's agent, Harry R. Allen, (pp. 610-612), which Mrs. Cardoner never denied. After reciting the conversation with Mr. Day, witness says (p. 611), that in his talk with Mrs. Cardoner, the conversation came up (p. 612):

> "A. The way the discussion came up, Mrs. Cardoner wanted to sell her interest, and it was a question of getting a fair value, a fair price for it, and she seemed worried * * * She seemed worried about what her daughter would think of it, and she said, 'What excuse will I give Bertha?' And then this discussion came up about the probabilities of no more ore being found there. I think I told her that mining engineers in examining a

mine would allow so much below what they could see. And the Hercules had been worked for approximately 12 years—or 16 years, and had paid something over nine million dollars in dividends, and had accumulated assets that would bring it up to about in round number eleven million dollars that it had paid in that length of time.

Q. Where did you get those figures?

A. Why, I got them off of her statements. ?

Q. Pointed them out to her at that time?

A. Sure, I put them down on a piece of paper at that time, figured them out.

Q. All right.

A. This was all roughly, you understand, etc."

And again at pp. 643 and 644, Witness Allen on cross-examination, says:

"Q. Didn't you say on your direct examination that you pointed out to her something about, something was said about the Northport smelter and the Pennylvania smelter?

A. As I recall it, I listed those items together with the assets of the company. I think I analyzed the statement of March 31st, if I am not mistaken. I think that is one of the statements that I had, and I just took the profit and loss account and deducted the dividends,—I had listed the other items—deducted the dividends and the balance showed the profits that the concern had made that was unpaid in dividends, and I figured it amounted to about eleven million dollars. I think that is the way I arrived at that amount."

Witness then identifies the March, 1916, statement as the one he used, and at pp. 644, 645 and 646, shows that the items of the Northport Smelter and Pennsylvania Refinery are on that statement.

By reference to the March, 1916, statement (Exhibit No. 21, p. 1209), Allen's testimony is corroborated.

That statement shows these items:

Loss and Gain (p. 1217)	$11,023,642.38
Dividends (P. 1214)	9,107,527.72
Difference	$ 1,916,114.66

This is the difference between profits and dividends aggregating approximately $2,000,000.00, of which Allen informed Mrs. Cardoner.

The specific items making up this difference are set out at pp. 1214, 1215, 1216, and 1217, in the trial balance.

Mrs. Cardoner was informed of this difference and of these items, by her own agent, and counsel's argument to the contrary is contrary to the record.

This March, 1916, statement is one which Mrs. Cardoner gave to Mr. Allen.

WITNESS PAULSEN, at p. 685, says:

"A. Oh, yes, Mrs. Cardoner made a remark about no dividends having been paid for two months prior to that time. The custom was ordinarily to pay dividends about the first of the month, and there had been none paid on the first of September or the first of October of that year. And she asked—I don't remember that she asked, but she mentioned the fact that no dividends had been paid for the last few months, and wondered what

their reason for it was. I made the reply that the Hercules had gone into the smelter business and branching out, and that they had to build up a reserve to take care of these additional business propositions, and also that we had a large amount of ore in transit, to the smelters, which had not been settled for, and that the company did not have such a big surplus on hand at the time, and that is about all the explanation I made to her."

P. 48, appellant's brief, says:

"It will be seen from the answer to interrogatory 14 that appears at pp. 72-77 of the record that the dividends declared approximated the net earnings each year up until the year 1915, the very year that Madam Cardoner became possessed of the property, and in 1915 the dividends were less than one-third of the net profits, and in 1916 they were a million dollars less than the net profits up to the date of sale."

Appellant's brief, p. 46, says:

"The plaintiff had a right to believe, unless otherwise informed, that the dividends would approximate the earnings of the mine, inasmuch as the dividends apparently were paid monthly. * * * these are the only two years that her husband had not managed the mining interests, as he died in July, 1915."

This argument is false and misleading. Mr. Cardoner never managed any part of the Hercules mine; and the argument throughout the brief that the dividends were suppressed after Mr. Cardoner's death is equaly false. The dividends and profits never were co-equal. The following table, compiled

from Eugene R. Day's answers to interrogatories, demonstrates this fact:

YEAR	NET SMELTER RETURNS	NET PROFITS	DIVIDENDS	BALANCES
	$	$	$	$
1901	27,810.77	20,567.72	8,000.00	12,567.72
1902	266,785.42	169,527.03	94,200.00	87,894.75
1903	667,616.58	438,746.27	257,800.00	168,066.02
1904	731,107.59	439,418.89	544,000.00	46,761.57
1905	725,218.80	375,348.90	626,300.00	196,700.47
1906	1,272,000.41	787,534.19	880,000.00	126,240.01
1907	1,296,328.64	765,160.89	800,000.00	91,400.90
1908	907,071.43	383,751.89	448,000.00	27,152.79
1909	789,245.88	325,305.35	352,000.00	458.14
1910	874,955.04	418,542.00	384,000.00	35,000.14
1911	1,148,574.25	544,429.34	329,227.72	250,201.76
1912	1,415,462.29	715,763.33	704,000.00	261,965.09
1913	2,055,633.60	1,207,326.86	1,124,000.00	445,291.95
1914	2,991,148.64	1,868,761.81	2,176,000.00	138,053.76
1915	2,103,955.79	1,096,019.37	320,000.00	703,219.75
1916	3,690,703.74	2,368,682.90	1,432,000.00	1,448,785.94
Total	$20,963,618.87	$11,915,886.74	$10,379,527.72	

It is thus seen that each year from 1901 the dividends and net profits never were co-equal, and the argument of the counsel, pp. 45, 46 and 47, is directly contrary to the record.

The constant repetition of this argument illustrates the extremity to which counsel are driven in this case.

At pp. 45 to 48, appellant argues:

"During the year of 1915 the net profit of the company was $1,096,019.37, and the dividends were $320,000, making a difference between the net income and dividends paid $776,019.37."

And again at p. 46:

"But the testimony of Eugene R. Day as reflected by his answer to interrogatory No. 14 (Tr. p. 77) shows that up to and including the 28th day of October, 1916, the net profit for the ten months of said year was $2,368,682.90, or approximately a difference of $1,000,000.00 between the net income and the dividends during said period."

Referring to the table last above set out, the balance up to October 28, 1916 was $1,448,785.94.

From the statements rendered, this balance is made up as follows:

Accounts Receivable	$ 29,400.67
Ore in Transit	1,048,864.14
Cash	649,359.48
Total	$1,727,624.29
Deduct the amount due smelter	278,838.35
Balance	$1,448,785.94

Counsel's misconception of the financial conditions of the Hercules Mining Company as shown in the statements, arises from his failure to appreciate the trial balance which is a part of each monthly statement.

At pages 45 et seq., appellant's brief pays marked attention to the September, 1916, statement. But, as we read that statement it shows:

Net income from all sources in cash since beginning operations $12,019,128.04

From which there has been distributed in dividends $10,379,527.72

The balance is represented by the following assets:

Bills receivable	$ 56,589.65	
Northport smelter	241,789.70	
Pennsylvania refinery	87,500.00	
Republic mines	46,500.00	
Plant and equipment	407,956.03	
Power line	26,180.39	
Other investments	346,091.73	
Cash on hand	426,992.82	1,639,600.32
		$12,019,128.04

It shows cash receipts since the beginning of 1916:

From ore sales	$ 2,861,304.61
From interest and discount	11,755.34
	$ 2,873.059.95
And that the operating expenses for said period amounted to	1,804,007.92

His assertion of the difference between the net profits and dividends for 1915 and 1916 is as follows:

YEAR	NET PROFITS	DIVIDENDS	DIFFERENCE
1915	$1,096,819.37	$ 320,000.00	$ 776,019.37
1916	2,368,682.90	1,432,000.00	936,682.90
Total	$3,464,702.27	$1,752,000.00	$1,712,702.27

By reference to the respective trial balances from month to month, every item of receipt and disbursement is neces-

sarily accounted for, and hence, the imagined discrepancy for the years 1915 and 1916 is disproven.

It is worthy of note that no co-owner of the Hercules Mining Company ever claimed there was any such discrepancy as counsel now argue; and neither Mrs. Cardoner nor her able attorneys who prepared and tried this case, ever claim such.

The complaint is silent as to any such charge; Mrs. Cardoner never asserted it at the trial; and her then attorneys did not present such a claim, although the record shows the following:

A. From April, 1916, to October, 1916, Mr. Day had a standing offer to Mrs. Cardoner to inspect the properties and the books with whomsoever she might choose; she did not do so;

B. Pending litigation, at the hearing of objections to interrogatories, all the defendants joined in tendering to Mrs. Cardoner and her counsel the right of inspection and examination of all the assets and books of the company. This offer was declined. The plaintiff and her attorneys evidently preferred to take Mr. Day's word rather than to rely upon the testimony of any experts whom she might engage;

C. Mrs. Cardoner admits that she never demanded and was never denied inspection and examination of the books and properties; and

D. Each co-owner in the Hercules Mining Company had as much right as E. R. Day to inspect the books kept by their employes, and to have all information divulged to them by their mining engineers, mine superintendent and employees.

At the trial (pp. 539-540), respective counsel stipulated:

'(P. 540.) MR. GRAVES: I will stipulate, if agreeable to counsel, that these interrogatories go in for all purposes of this case."

The record shows:

A. June 4, 1917, Amended Bill of Complaint filed;

B. June 4, 1917, Interrogatories filed;

C. August 3, 1917, Answer of Eugene R. Day to Interrogatories filed;

D. June 30, 1917, Answer of Harry R. Allen, to Interrogatories 18 and 27 filed; and

E. December 5, 1917, Trial of Cause begun.

Mrs. Cardoner's former attorneys received the answer to these interrogatories in August, 1917, and the offer to inspect the mine was made in Open Court in June, 1917.

They had the answer to these interrogatories from August, 1917 to December, 1917, and Mrs. Cardoner's agent, Allen, testified at the trial that he called her attention to the difference between the profits and dividends and she never denied it.

The contention now made by appellant's counsel after the death of Mrs. Cardoner was never urged during her lifetime; it is contrary to the record, false in fact and comes with bad grace at this late day.

No question of Eugene R. Day's integrity was ever made at the trial, nor was there any claim of improper bookkeeping or suppression of such facts as are now argued.

On the other hand, the record shows (pp. 733-734) (referring to administratorship):

"Q. Something has been said here, Mr. Day, about the difference between a statement of the receipts

and disbursements, and some $5,000.00 item of your fees. Will you tell the circumstances about that?

THE COURT: It seems to me we are taking too much time to go into these details. I cannot see that they are important.

MR. BEALE: Very well your Honour please.

THE COURT: There is no question made here of this man's integrity in handling the estate is there gentlemen?

MR. GRAVES: No, sir, not a bit."

This concession makes his testimony impregnable; and when he says:

"I gave her all the information I had" etc.

'I never concealed anything from Mrs. Cardoner,"

all contention that he practiced any fraud upon Mrs. Cardoner either by mis-representation, concealment or suppression of fact, is ended. That concession, coming as it did from Hon. Frank H. Graves, Judge Morgan J. O'Brien, the eminent counsel who prepared the cause for trial and who, since the decision below are no longer connected with the case, is effectual as a conclusive admission of the fact there conceded.

This record shows that Judge Dietrich found as a fact that Mrs. Cardoner wa s not a credible witness and no error is predicated on that finding; and although she is the sole witness who charges E. R. Day with fraud, her attorneys concede his integrity and the court found the facts for defendants. In all cases of conflict between his evidence and Mrs. Cardoner's statements, the findings are supported by the testimony of concedely credible witnesses of unquestioned integrity. The familiar rule applies.

Butte & Superior Copper Co. vs. Clarke-Montana Realty Co., 39 S. C. 231-248 U. S.

The case presents this condition:

Plaintiff stands in a court o fconscience charging Eugene R. Day with direct and constructive fraud, and while she has him thus charged, she is offered every opportunity to inspect the properties and the books with her own experts and to find any evidence that might exist to prove such charges. This offer was declined; and the plaintiff and her attorneys preferred to stand upon his word rather than upon the testimony of any person whom they might employ to impeach his integrity or his honor. This fact is a certificate to his credibility, integrity, honesty and character and is the strongest testimonial which plaintiff could possibly give him.

DEPTH OF ORE BODIES.

At several places in appellant's brief, the statement is made that E. R. Day did not tell Mrs. Cardoner of the probable depth of ore bodies.

Refuting these statements the record shows:

WITNESS E. R. DAY, p. 727:

"Q. Was there any statement made in reference as to how deep it might go?

A. Yes, that was talked over.

Q. What was it?

A. She asked me how deep that I supposed it would go, and I told her no one knew that; that the best opinion we could have would be proved by the example of others who mined in the district close to that particular place.

Q. Well, did you go into the history of those in any way?

A. Well, I recited further my idea in the matter, and I told her it was my opinion at that time that the Tiger did not pay lower than the fifteen or eighteen hundred feet below the creek level."

Witness then says that the creek level was from fifty to one hundred feet below No. 5 tunnel.

Plaintiff's expert, Greenough, estimated the depth at 1600 feet and defendant's witness, Burbidge, at 1900 feet below the Hummingbird tunnel, giving the exact figures of probable depth which Day had told Mrs. Cardoner.

In addition, Mrs. Cardoner's agent, Allen, says (p. 612):

"Q. All right.

A. This was all roughly, you understand. Then I told her also—well, she had lived there in that camp as long as I had, and she knows all of these things, and the different mines that had been worked.

MR. O'BRIEN: Hold on.

A. That is, the Tiger and the Poor Man I recited."

Witness then tells what he discussed with her.

These facts show that Mrs. Cardoner was accurately informed as to the probable depth of the mine.

See also Allen's testimony pp. 612 et seq., stating that he discussed the depth of various mines in immediate vicinity of the Hercules, with Mrs. Cardoner.

In appellant's brief at p. 68, the record is misquoted. In referring to Burbidge's estimate the depth of the Tiger mine, counsel have omitted the remark of the court, and also the

reference to Burbidge's former testimony. The correct record is at pp. 904 and 901 of the transcript, as follows:

"(P. 904). Q. Mr. Burbidge, how did you arrive at your estimated depth of the mine below the Hummingbird tunnel?

A. By assuming that it would go as deep as the neighboring mine, the Tiger.

Q. How deep does that go?

A. It was sunk to a depth of 2200 feet but it was not profitably operated below——

The Court. You have already answered that in your statement?

A. Yes sir, that was in my statement.

Referring to Mr. Burbidge's statement at p. 901, we find:

"In estimating that depth, we are controlled by the data available concerning other mines in its vicinity. The Tiger, its nearest neighbor, ceased to be profitable below a depth of 1800 feet, which corresponds to 1900 feet below the Hercules No. 5 tunnel, etc."

Appellant's present attorneys are seemingly unfamiliar with the record and the situation as shown at the trial.

ORE IN TRANSIT.

At pp. 47-89-91-92-93, and other places in Appellant's brief, the ore in transit ($1,048,864.14) is treated as all profits.

This is clearly erroneous, as it contains each element of dividends, cost of mining, milling, transportation, treatment, reduction, refining, marketing, fluctuation of value, income

and other taxes, depreciation, and repairs, and outlay involved in the entire operations.

WITNESS JEROME J. DAY, at p. 1135 says:

"Q. What are the elements involved in that ore in transit?

"A. It is the element of fluctuation or decrease in price.

"Q. That is the risk, is it?

"A. That is the risk.

* * *

"Q. From the amount that is received from the ore in transit what sums are paid?

"A. Operating expenses and dividends, upkeep, and we class such items as overhead, upkeep, taxes and such as operating cost.

"Q. Then the ore in transit would contain those items as long as it was in transit?

"A. It would."

The testimony of Harry L. Day, pp. 970-981, read in connection with the table showing annual net profits, dividends and balances, heretofore set out, accentuates this statement.

The owners of the Hercules Mine started at zero in the financial world; their entire fortune has been made from the dividends declared from the profits yielded from the ore that was shipped; and from the same source the entire equipment of the Hercules Mining Company has been acquired.

If we deduct from the ore in transit ($1,048,864.14), the various items of cost above shown, the amount left for dividends approximates $400,000.00, of which Cardoner's one-sixteenth would be $25,000.00, when distributed. But

this ore must remain in transit to the approximate end of the mine's life. Estimating this period at ten (10) years and taking 12 1-2 per cent as the rate of return which a mining investor should receive (Greenough pp. 1087 and 1095) the present worth of her interest is $11,111 1-9.

She was overpaid in the cash estimate by $14,342.43; and, applying such overpayment to the above item, she is still overpaid. This should effectually dispose of the claim asserted about the "ore in transit" item, even if we disregard the testimony showing the facts as heretofore set out.

The item is negligible in a transaction of the magnitude of that involved.

ORE IN TRANSIT, CASH ON HAND, SMELTER AND REFINERY.

The persistence with which appellant refers to these various items as severable, distinct assets, makes a brief summary of matters pertaining thereto, necessary.

Jerome J. Day says, (p. 1010):

"Q. Do you know why the Hercules Mining Company ever went into the purchase of a smelter or an interest in the smelter?

"A. Because they could not get an outlet for their ore on anywheres near the terms of their previous contract or what they believed to be a legitimate charge for the handling of their ore.

"Q. As I understand that situation, that smelter and refinery simply take the place of your former contract?

"A. It absolutely did."

Harry L. Day says, (pp. 992-993) that the mine, cash

on hand, ore in transit, "smelteries" (sic—smelter) and "refineries" (sic—refinery), "mills" (sic—mill), and all of its assets must be considered as a whole as "it all rides together."

The following facts are plainly shown:

(a) The original smelter contract of the Hercules Mining Company was very advantageous and could not be renewed.

(b) The Company would not enter into a new or different contract, as the terms fixed by the smelter company were excessive;

(c) It faced a crisis which compelled it either,

(1) To purchase an interest in a smelter and refinery, or,

(2) To close down.

The management chose the former course and purchased an interest in a smelter at Northport, Washington, and a refinery at Pittsburgh, Pennsylvania; the sums paid for these properties would have gone to pay the cost of smelting and refining under any contract with the smelter people. The ownership and operation of these properties compelled the maintenance of a large CASH reserve and of ore in transit, because it takes three to four months (Jerome J. Day p. 1134) to get returns on ore shipments.

At the time of the transaction these various items aggregated the following:

(a)	Ore in Transit	$1,048,864.14
(b)	Northport S. & R..... ...	288,289.70
(c)	Pennsylvania Refinery ...	87,500.00

(d) Cash on Hand (p. 95) ... 370,521.13

Total.....$1,795,174.97

But taking the items of cost and expense from the ore in transit, we have shown above, the sum for distribution as dividends would be approximately $400,000.00.

Using this item with the above figures, we have:

(a)	Ore in Transit (probable dividends)	$ 400,000.00
(b)	Northport Smelter	288,289.70
(c)	Pennsylvania Refinery ...	87,500.00
(d)	Cash on hand	370,521.13

Total.....$1,146,310.83

The Reeves' 1-16 interest and the Samuels' 1-32 interest were sold upon a basis of $4,000,000.00 for the entire mine and its properties, when the mine was eight (8) years younger than at the time of the transaction.

Likewise, the Adams' option of 1904 was upon the same basis, and Eugène R. Day first estimated the value of the mine as $4,000,000.00, and Hutton's estimate was the same.

Eugene R. Day says he told Mrs. Cardoner the ore in transit was worth probably over $800,000.00 to $1,000,000.00, and in the transaction, Day and Allen estimated the cash at $1,600,000.00.

Day therefore, paid the original $4,000,000.00 price for the mine plus $1,600,000.00 for the added improvements, etc.

His estimate of $1,600,000.00 is a fair approximation of the total sums invested in the four items, to-wit: $1,795,-

174.95, and is greatly in excess of the dividends which could be reasonably expected from the ore in transit, plus the total amounts invested in the smelter and refinery, and the cash on hand, to-wit: $1,146,310.81.

It is very evident that the price he paid, to-wit: $5,600,000.00, is at least a fair approximation of the true value, and brings the transaction, so far as price is concerned, within the admitted rule.

Appellant's brief, p. 93 et seq., treats the ore in transit the same as cash in bank. Appellant overlooks the fact that when the mine is in active operation ore is shipped daily, and that it requires three months to get returns on any shipment. The result is that when returns from shipments are received it is paid out largely to put other ore in transit. The continuous circulation of this ore in transit is a circulating or revolving fund, the larger portion of which is put back into the actual operation of mining, milling, transporting, smelting, etc., of the other ores still in transit.

In Dooley v. Pa. R. R. Co., 250 Fed. 142, syllabus point 3, reads:

> "The court will take judicial notice that no railroad system can be successfully operated without a revolving fund, available for the payment of wages and for other necessary expenses in railroading."

The entire evidence and the findings show that Day gave Mrs. Cardoner all the information he possessed. In addition, she sought the advice of Allen, the most efficient mine accountant in the Coeur d'Alenes, whom she thus describes (complaint par. 6, p. 18):

"At the time of the transaction aforesaid, Allen was believed by the plaintiff to possess exceptional opportunities by reason of his connection with the mine operations to know the value of the mine, its prospects, and what was being done in its operation. She believed him also to be a man of integrity and upon whose statements she might rely and she was influenced in making the sale by his representations."

The whole record shows that Day's conduct measures well up to the standards required of a mine manager in purcashing the interest of a co-owner who is at a distance and who is, therefore, bound to rely and does rely upon such manager for full information; although, in this case, Mrs. Cardoner was personally present from April to October, 1916, for the sole purpose of looking after and becoming acquainted with this property and its value and did not rely upon Day, nor did she inform him that she was relying upon him for information, after the close of the estate; but on the other hand, she notified Day on October 14, 1916, that Allen was her agent and would tend to her business; and thereafter, conducted her own investigation through her agent, her friends and co-owners, sought advice entirely independent of Day, proposed the sale herself, and tried to compel him to pay $6,000,000.00 by threats of selling to his business competitors and fixed her own terms of sale requiring $50,000.00 as a cash payment with the understanding that it would become hers if the transaction failed.

These facts bring this case clearly within the rules stated at,

POINT III.

A transaction cannot be assailed on the ground of breach of alleged fiduciary relations where the complaining party conducted an independent investigation, acted through her own agent, consulted her friends and did not rely upon the fiduciary to furnish information.

Colton v. Stanford, (Cal.) 23 Pac. 16, (pp. 2123).
Curran v. Smith, 149 Fed. 945 (3rd C. C. A.) affg. 138 Fed. 150 (156-158).
Pittsburg L. & L. Co. v. Northern C. L. Ins. Co., 140 Fed. 888 (893-bottom) (cases collated).
Palmer v. Shields, 125 Pac. 1051.
Blank v. Connor, (Cal.) 141 Pac. 217, (220, last paragraph).
Kinne v. Webb, 54 Fed. 34 (Point II, p 39) (8th C. C. A.)
Littell v. Hackley, 126 Fed. 309, (6th C. C. A.)

Likewise, where concealment is the ground of action, it must appear that plaintiff relied upon defendant to make disclosure of the fact concealed, and that the concealment was a moving inducement to the plaintiff's change of position.

The concealment, misrepresentation or non-disclosure must be intentional.

14 Am. & Eng. Ency. of Law, Second Edition, p. 69.
Colton v. Stanford, 23 Pac. 16 (syllabus Point I).

In such a case the question is, "What did the trustee conceal," and not "What would a search by him have disclosed." The trustee is not compelled to search for facts

which he does not know nor to express his opinion; his duty is discharged when he gives the information which he has.

Where the relation is trustee and beneficiary, reliance must be alleged and shown.

> Burke v. McGuire, 98 Pac. 21 (25) (right hand column, bottom). "Must allege that he relied on them in his subsequent action."

The gravemen of the complaint was originally that Allen (who was said to be Day's agent) MISREPRESENTED certain facts while E. R. Day was charged with CONCEALMENT. The charges of misrepresentation by Allen were declared groundless by the trial court, and no error is predicated on the findings on that issue. Appellant now argues "CONCEALMENT" by E. R. Day; but the record is silent as to what it was Day "CONCEALED" and the most diligent search of appellant's brief, the evidence in the case and the decision below, throws no light upon the subject.

POINT ~~VII.~~ VI.

Parties who deal with and calculate the chances of value of property, of speculative value, are bound by their transactions, unless there is an element of breach of confidence, misrepresentation, or culpable concealment, amounting to actual or constructive fraud.

> Colton v. Stanford, 23 Pac. 16 (24-25)
>
> "Where parties * * * intentionally speculated" and "the event turns out different from that expected * * * this error * * * is not such a mistake * * * as entitles

the disappointed to any relief. The parties * * * assume the risks."

Taber v. Piedmont Heights Bldg. Co., 143 Pac. 319-320. Rule applied where the parties, "treat upon the basis that the fact is doubtful. Can mistake be alleged in a matter which was considered as doubtful and treated accordingly? Chancery will certainly not relieve."

Cleveland Cliffs Iron Co. v. East Itasca Mining Co., (8th C. C. A.) 146 Fed. 232 (syllabus Point 4) (p. 236 et seq.), quoting from U. S. v. Barlow, 137 U. S. 271 (281); 10 Sup. Ct. 77; 33 L. 346, and collating authorities.

Moss v. Downman, 176 U. S. 413, 417, says: "The speculator is never an object of favor."

Gertgons v. O'Connor, 191 U. S. 237, 246, says: "He evidently took his chances * * * speculating upon possibilities which have not been realized, and having so speculated he cannot complain." The court cannot aid in such case because it is a "chance," simply and there are "no fixed rules to guide their judgments," Gordon v. Butler, 105 U. S. 553.

W. W. P. Co. v. Kootenai County, 210 Fed. 867, affg. Dietrich, J., who in an opinion on file below and in the record that went up held that value is generally so uncertain that a finding of total value of $1,718,636.37 for an electric system would not be reversed where the controverted difference is $200,000.00 or $300,000.00 more or less.

Pomeroy's Equity, 4th Ed., Vol. 2, Sec. 855, pp. 1745-1746.

POINT ~~VIII~~ XII

Mining properties are necessarily of speculative value, and transactions concerning them cannot be set aside for inadequacy of consideration where the price paid is a fair approximation to its value rather than the full value of such property.

Brooks vs. Martin, 2 Wall. 73.
Patrick v. Bowman, 149 U. S. 44.
Richardson v. Heney, (Ariz.) 157 Pac. 980.

The laws of the mining states almost unanimously recognize the difficulty of ascertaining the value of mining property, and provide, therefore, for taxing the actual output of the mines, rather than to undertake to ascertain the value and assess the property upon the value thereof.

Foster v. Hart. Cons. Mining. Co., 122 Pac. 48 (50) "Cannot be ascertained with any reasonable degree of certainty until mined."

Reding & P. R. R. Co. v. Balthazar, 13 Atl. Reports, 294 (297). "The difficulty indeed the impossibility of proving the specific value."

Southern Development Company v. Silva, 125 U. S. 247; 31 L. 678; 8 S. C. 883. "In the nature of the thing utterly speculative."

Gordon v. Butler, 105 U. S. 533; 26 L. 1166. "Necessarily, be more or less speculative character."

Biwabek Mng. Co. v. U. S., 242 Fed. 9 (16). "Great, if not insuperable difficulty" * * * depend "upon unknown and changing conditions."

Doyle Internal Revenue Collector v. Mitchell Bros.,

235 Fed. 686, (691). "Has no market value. Cannot be measured. Predominately speculative."

Fred Von Baumach, Collector, Etc., v. Sargent Land Co., 242 U. S. 503; 37 S. C. 201 (208). "Value * * * lessened from exhaustion. Cannot be replaced."

Hanley v. Fed. M. & S. Co., 235 Fed. 769 (771-773-774-777). "Real value * * * generally unknown * * * subject to great and sudden fluctuations."

Idaho Tax Commission Report 1913-1914, p. 46. "No method whereby cash value of a vein mine * * * can be determined * * * until the mine is worked out."

At pp. 96-97, of appellant's brief, we find:

"One only has to read the testimony of Burbidge and Greenough to see that Eugene R. Day never disclosed to Mrs. Cardoner but little of the elements that went to make up the value of this mine. Had he acted in as good faith as the law requires, he would have had his experts go into the mine, make the necessary measurements, make up full statements of all conditions as the court has required him to make in answer to interrogatories in this case, would have given the size of the ore shoots, have given a detailed statement not only of the conditions but of the possibilities of the mine and would have done this in writing so that she might have had the information for expert advice."

The citation from which counsel quotes at p. 97 of his brief does not sustain the rule as above set forth.

It holds in common with all other cases that the trustee must not conceal anything which he knows; it does not hold that he must not conceal anything which he does not know, because that is an impossibility; neither does it state that the trustee must make a search to find out what he does not know and then divulge that to his co-owner who is threatening to sell out to his rival unless he purchases.

This is not a case where the selling partner could not make such inspection and search because Mrs. Cardoner was personally present and could have learned from the mine's superintendent, the engineer, the bookkeepers, the accountants, the mine foreman, and every employee, the same facts which Eugene R. Day might have found from those same people. She was a member of the partnership as much as Mr. Day, and the employees at the mine from the highest to the lowest were her servants as much as his, and would have to inform her as to all matters concerning which they might have informed him. She could have employed accountants, engineers, geologists and mineralogists and had them examine and make reports; Day was not required to do that for her, but only to allow her access to the mine and accounts.

She never made demand for inspection of either the property or the books, nor did Day conceal anything whatsoever from her, nor did he ever suppress, conceal or misrepresent or misstate any fact within his knowledge to her.

From Colton v. Stanford, (Cal.) 23 Pac. 16, we quote point 1 of the syllabus:

> "Where a beneficiary, in negotiating with her trustees for a settlement, renounces all confidence in them, and acts exclusively on the advice of her own per-

sonal friends and advisers, specially selected by her to make investigations, and counsel her, a contract of compromise entered into between her and the trustees, who during the investigation acted in good faith, and disclosed everything within their knowledge, will not be set aside on the ground that the trustees did not impart all the knowledge which they might have acquired by diligent and skillful search."

From the opinion (23 Pac. 21), we quote:

"The findings show that the defendants in good faith disclosed every fact within their knowledge. There is nothing in the findings to show that plaintiff or her agents were misled as to any matter except the statement in regard to the number of shares of the Rocky Mountain Coal & Iron Company stock, which they claim to own, though held by Mr. Colton. Of this matter we shall speak hereafter. Here, therefore, we have a case in which—assuming the existence of a fiduciary relation, and that the presumptions as to confidence and the burden as to proof are as claimed by appellant—the undisputed facts show that there was absolutely no confidence reposed by the beneficiary, but that she acted exclusively upon the advice of several disinterested experts and professional friends, specially selected to investigate and counsel her, because of their ability and familiarity with the affairs of the trustees with whom she was dealing, and who acted towards her in the highest good faith. To hold that, under such circumstances, a contract, entered into by the parties, compromising and settling disputes of the most doubtful character and value, cannot stand, if it subsequently appear that the

trustee did not impart to the cestui que trust not only all the knowledge of the transactions of which he was possessed, but all that he might have acquired by diligent and skillful search, would be to place an absolute embargo upon all settlements of disputed questions between parties holding trust relations, although equity favors the amicable adjustment of claims, which, like those involved in this settlement, bid fair to become a fruitful source of litigation."

After discussing the policy and reasons of the law under such circumstances, the court concludes, (23 Pac. 22):

"It is unnecessary for us to review the authorities on this subject. They will be found, we think, to fully support the views we have expressed; and in order to make as brief as possible this opinion, which, perhaps is already unnecessarily extended on this question, we simply cite some of the cases, without commenting upon the peculiar features of any of them. We have examined the cases cited by appellant, and find nothing in them which conflicts with what is said herein. Kimball v. Lincoln, 99 Ill. 578; Gage v. Parmalee, 87 Ill. 330; Casey v. Casey, 14 Ill. 113; Farnam v. Brooks, 9 Pick. 213; Knight v. Marjoribanks, 11 Beav. 324; Morse v. Royal, 12 Ves. 355; Hunter v. Atkins, 3 Mylne & K. 113; Hager v. Thomson, 1 Black, 80; Courtright v. Burnes, 2 McCrary, 532; Geddes' Appeal, 80 Pa. St. 460; White v. Walker, 5 Fla. 478; Hall v. Johnson, 41 Mich. 289, 2 N. W. Rep. 55; Bowman v. Carithers, 40 Ind. 901 Turner v. Otis, 30 Kan. 1, 1 Pac. Rep. 19; Murray v. Elston, 24 N. J. Eq. 310; Korn v. Becker, 40 N. J. Eq.

408, 4 Atl. Rep. 434; De Montmorency v. Devereux, 7 Clark & F. 188; Hough v. Richardson, 3 Story, 690; Loesser, 81 Ky. 139; Motley v. Motley, 45 Ala. 558; Kisling v. Shaw, 33 Cal. 425."

As showing Mrs. Cardoner's mental attitude toward Eugene R. Day at the close of the administration on October 14, 1916, we quote:

WITNESS HARRY L. DAY, at p. 969,

"Q. Now, aside from what you heard of Mrs. Cardoner's objections, as you have explained, state what, if anything, you knew in fact, aside from any action on her part, concerning the existence of any attempt or acts in misrepresenting or defrauding her, or failing to make proper disclosures to her, as alleged in the complaint in this case?

A. I never talked with Mrs. Cardoner directly about the matter , or even indirectly. I talked with her a little bit about the property. Some time in the summer she came to the office to see my brother, and he was not in, and she was considerably agitated, and I talked to her and tried to make some explanation. She was very much annoyed at the delay in settling up the administration, and roasted the lawyers and the court and the law and my brother, and generally everybody pretty severely. I have known her a long time, and I was not disturbed about it, and explained to her that I thought things were going about as fast as they could, that lots of this delay was caused by the statutes, which compelled publication, and that sort of thing, and we all had those experiences."

WITNESS EUGENE R. DAY, at p. 732:

"Q Well, why?

A. She said—I could not give it to her because Mr. Gray and Mr. Wourms had told me that the time had not arrived when I was authorized to give it to her. I acted under their direction, and of course I did not give it to her. She came in the office, I remember the occurrence, and she said that the reason that she could not get her money, was that I was too busy, that Mr. Gray was too lazy, that Mr. Wourms was too lazy, and that is the reason that she could not get her money, and that she had advice on the matter, and she was told that she could get it, and she was going to have it."

We have heretofore shown that immediately at the close of their transaction on October 14, 1916, she notified both Wourms and Day that Allen would attend to her business. Mr. Wourms says (pp. 959-960):

"A. No, there was not at that particular time, during that conversation; but after the proceedings in the probate court had been completed, I walked out and met Mrs. Cardoner in the corridor there, and she had pestered the life out of me during the Rossi case about wanting her property, and controlling it and handling it herself, coming to the court and calling me out, I think three times in one day during that trial, and I told her now she had her property, and I was glad it was settled, and she could handle it herself. And she told me that Mr. Allen would attend to her business."

She immediately checked the account which Eugene R.

Day handed her as administrator (Exhibits 15 and 16, pp. 1186-1189); she found what she thought were errors therein and immediately sought Harry R. Allen that same day, went over the matter with him, and he made the notation marked Exhibit 17, pp. 1189-1190, and Exhibit 49, p. 1310.

She also took steps at once to sell her stock in the Wallace Bank & Trust Company. This stock was inherited from the estate and was stock in the Day bank. Allen sold it for Mrs. Cardoner and reported the sale to her in his letter (Ex. 23, pp. 424-425) in which he states (under date 10-19-16):

> "I also enclose certificate for ten shares of the Wallace Bank & Trust Co., stock, and a check for $1622.40 in payment of same. Please sign your name on the back of this certificate and have it signed by one witness, and return to me by registered mail."

About October 18, 1917, Allen, at her request began negotiations with E. R. Day for the disposal of her Hercules interests, etc., after she found from Paulsen and Hutton their ideas of its worth, and Allen threatened Day that if he did not buy the stock she would offer it to them and then to the A. S. & R., the known business rivals of the Days, and asked of Day a sum which he refused to pay even under her threat, telling Allen to sell it to whosoever he would, that—"I'm through." This threat does not show reliance upon Day, but does show her defiance of him.

During the negotiations for the sale of her interests, she never talked with Day in any way directly; never asked him for any information whatsoever, nor let him know that she was relying on him for information other than or different from that she had already obtained from him, from Hutton,

Paulsen, Woods, Allen, the monthly statements and the various sources of information through the newspapers, trade journals and mining papers which she admitted having read at different times.

The findings of the trial court are sustained.

VALUE.

Appellant's brief, pages 64-90, attempts to estimate the values of the mine until it is exhausted.

Throughout this discussion the appellant repeats several common errors:

(a) In estimating the ore in transit, as all profits and as ready cash;

(b) In calculating future imaginary profits at $7.29 per ton (p. 91) with the ore in transit, considered all profit;

(c) In taking $7.50 per ton as profits (p.89);

(d) In taking the ore lengths as measured by Greenough on the maps (brief p. 84), and disregarding their true length;

(e) In failing to appreciate that Mrs. Cardoner sold a minority interest (1-16), and in calculating this minority as a majority.

Appellant overlooks the conceded rule of valuation as stated by Judge Dietrich, (pp. 1400-1401):

"Upon consideration of the entire matter my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was prob-

> ably as much as she could have obtained from any other source, and in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required. Brooks v. Martin 69 U. S. 70, Patrick v. Bowman, 149 U. S. 411."

and assumes that where one mining partner sells a minority interest to the mine manager, the vendor is entitled, not only to the reasonable value at the time of the sale, but also to the actual present cash valuation of all future possible profits to the end of the mine's life.

Appellant also assumes that the purchaser shall make no profit whatsoever, but that he is limited to the value paid the seller, although the purchaser is compelled to continue the business for years to realize such possible values and to assume all the risks of the business. No authority is cited to sustain such a position.

Appellant computes the probable future profits upon the assumption that the ore bodies, mineral content, mineral profits, rates of shipment, cost of production and other elements will remain constant to the end of the mine's life; that no faults, dikes or geological changes will interfere with the continuous ore reserves which are largely speculative, because not visible; that there will be no shutdowns; labor difficulties, or other events to disturb the orderly mining operations; and that the seller must be relieved from every risk of the business, from all income, and other taxes, and must be paid in advance, the entire theoretical value of the mine.

In no other business, pursuit, enterprise, or occupation, has such a rule ever been upheld.

In the brief, appellant disregards the testimony of the

witness Greenough, who was the only expert who testified for plaintiff.

We shall, however, discuss Mr. Greenough's testimony, as it is sufficient to sustain the court's finding, on the question of value.

Mr. Greenough assumes that there are four ore shoots from which mineral was extracted and gives them the following sizes at the Hummingbird, or No. 5 tunnel level:

East Ore Shott No. 1	Length 200 feet
East Ore Shoot No. 2	Length 220 feet
Middle (WEST)	Length 630 feet
West (MIDDLE).	Length 325 feet
	1375 feet

and estimates that such ore bodies of that constant length will go to a depth of 1500 feet below the creek level (p. 1084).

His estimated tonnage and values are therefore based upon the following size ore bodies (pp. 1056-1057):

	Length.	Width.	Sq. Ft. Area
East Ore Shoot No. 1	200 ft.	4 ft.	800
East Ore Shoot No. 2	220 ft.	4 ft.	880
Middle (WEST)	630 ft.	15 ft.	9450
West (MIDDLE)	325 ft.	5 ft.	1625
	1375 long		12,755

which he erroneously states at 12,775; and "assumes" that these lengths will go to a depth of "1500 feet below Canyon Creek," (p. 1057).

His estimate of "1500 feet below the level of the creek"

is an estimate of 1600 feet below the collar of the shaft in the No. 5 tunnel, as that is 100 feet higher than the creek level. (Burbidge, 920.)

The physical facts as shown by Witness E. R. Day as to the number of shoots of ORE at the No. 5 tunnel, are, (p. 819):

"Q. So that on your No. 5 level and above, you had THREE shoots, AT LEAST THREE SHOOTS, didn't you?

"A. Well, I think that there were three shoots, not at least three shoots.

At page 825 he describes each of these three shoots.

Witness Burbidge (p. 924), testifying from actual measurement says, at the Hummingbird or No. 5 tunnel level:

	Length.
"The East stope has	150 ft.
Middle stope	225 f.
West stope	600 ft.
Total	975 ft.

"The East Stope has a length of 150 feet. It shows the same length on the 200 level. It does not appear at all on the 400 level. It is cut off or merged in this middle stope.

"The midle stope has a length of 225 feet. * * * The middle stope or shoot comes down almost vertically without any particular rake. What it has is slightly to the west. It is quite evident that at some step very little below the 600 level it will merge in the west stope.

* * * And there is very little doubt that the middle stope will be cut off or merged in the same stope, and that below a depth of about 800 feet, there will be but the one shoot of ore, the west shoot.

"(West Stope) The length of that stope on the No. 5 tunnel is 600 feet. On the 200 level it is only 500 feet. On the 400 and the 600 level it is also — on the 400 it is shorter. On the 600 the drift has not yet reached the end of it, but it is so near to it that we are safe in assuming that it will be the same length, 500 feet. I should go back for a minute to the west shoot and point out that it has a very strong rake in the east, in this direction."

Burbidge gives the average WIDTH of the big ore shoot (WEST STOPE) at the No. 5 tunnel as 15 feet; but at the 200 level below the No. 5 tunnel it is only 12 feet. (pp. 917-918).

The following physical facts are therefore quite plain:

(a) The EAST ORE SHOOT No. 2, (described by Mr. Greenough) never produced commercial ore:

(b) The EAST ORE SHOOT No. 1 (described by Greenough) cuts off entirely at about the 200 level or between that level and the 400 level, and his given length of that body is 50 feet too long;

(c) The big ore shoot (WEST, which Mr. Greenough erroneously calls MIDDLE) is but 600 feet long at No. 5 tunnel and Greenough's map measurement is wrong, as he measured to the end of the timbers; whereas Anderson, Hercules engineer testified that the timbers extended in most cases beyond the ore bodies;

And as to the same big stope, Mr. Greenough assumes a constant width of 15 feet, whereas it narrows at the 200 level to 12 feet and is of that width at the different levels below, so far as it was exposed when Burbidge saw it.

(d) The Middle Ore Shoot (which Mr. Greenough erroneously calls the WEST) cuts out and merges at the 800 level with the big ore shoot (WEST) and he erroneously estimates it for the full 1600 feet below the Hummingbird tunnel.

His estimated length of this middle ore shoot is also too long by 100 feet.

These measurements relate to facts at and below the No. 5 tunnel; but Mr. Greenough is also at fault in his measurement of a 50 foot depth ABOVE THAT TUNNEL in the following lengths:

East Ore Shoot No. 2..
220 feet (Never produced any ore)
East Ore Shoot No. 1...
50 feet excess length
"WEST" (Middle) .....
100 feet excess length
"MIDDLE" (West) ...
30 feet excess length

The mineral tonnage of the existing ore bodies in their actual sizes (instead of erroneous sizes ascribed by Greenough) reduces his estimate of tonnage and values, by the following:

EXCESS TONNAGE ABOVE NO. 5 TUNNEL AT $9.39 PER TON:

(Tonnage calculated at 9 cu. ft. per ton.)

	Length.	Width.	Depth.
East Ore Shot No. 2	220	4	50
East Ore Shoot No. 1	50	4	50
BIG Ore Shoot (West)	30	15	50
"Middle" (WEST, True Name)	100	5	50

TOTAL	Tonnage.	Value.
	11,277 7–9	$105,891.03

EXCESS TONNAGE BELOW THE LEVEL OF NO. 5 TUNNEL AT $4.50 PER TON.

	Length.	Width.	Depth.
A—East Ore Shoot No. 2 (Never Produced)	220	4	1600
B—East Ore Shoot No. 1 (Cut Out about 200 Level)	200	4	1400
C—Excess length of ore body—Big Ore Shoot—at #5 tunnel and below	30	15	1600
D—Excess length big ore shoot from 200 level down	100	15	1400
E—Excess width of Big Ore Shoot from 200 level	500	3	1400
F—Middle Ore Shoot—cuts out or merges with Big Ore Shoot at 800 level	325	5	800

TOTAL	Tonnage.	Value.
	972,000	$4,374,000

Adding these two items we have:

	Excess Tonnage	Excess Value.
Above No. 5	11,277 7–9	$ 105,891.03
Below No. 5	972,000	4,374,000.00
Total	983,277 7–9	4,479,891.03

When these are deducted from Mr. Greenough's estimates, we have the following:

	Tonnage	Value
Greenough's estimates (p. 1059) 2,310,000		$10,750,000.00
Deduction to meet physical facts	983,277 7–9	4,479,891.03
LEAVING 1,326,722 2–9		$6,270,108.97

Mr. Greenough's prices are taken in the above estimates; but Mr. Burbidge showed that the prices taken by him included two "BOOM PERIODS" one of which involved the extraordinary war-price period up to the date assumed by him, from its commencement.

The errors in estimating the length and width of Ore Shoots by the map, was exposed by Anderson, Hercules Engineer, at pp. 1029–1030. And in addition, Mr. Greenough was totally indifferent to the fault shown on the map, which marked the easterly limit of the Ore Shoots and which, if projected, would have cut off the ore bodies at the levels shown by the following testimony:

Anderson pp. 1030 to 1032,
Greenough pp. 1077 to 1084.

In speaking of the rates of interest which an investor in mines is entitled to receive, Mr. Greenough says, (pp. 1086–1087):

"Q. For an investment in a mining property ten per cent is a reasonable return, in addition to getting back your money at a period of time, is it not?

"A. Yes, I would say it was hardly enough.

"Q. Then twenty per cent?

"A. No, I would not say that.

"Q. Well, fifteen?

"A. Ten to fifteen per cent."

At page 1091, the witness says:

"A. Before I answer this question, however, I stated that—I want to testify that that was an estimate of the future earning value of the mine. The future earning value. I didn't answer it in the same sense that you are now propounding it to me."

After seeing how this per cent of return was applied in calculating what an investor should receive, the witness explained that such investor would first get his money in return and then, (p. 1095) says:

"Q. What rate of interest do you want to calculate on your figures, Mr. Greenough?

"A. Well, I will take a split between ten and fifteen. I will take twelve and a half.

"Q. Twelve and a half per cent?

"A. Yes, on your assumption that you have made.

At pages 1090 to 1091, Mr. Greenough states that it would require 13.75 years to remove his estimated tonnage, at the average rate of tons mined for the years from January 1, 1907 to October 28, 1916, as testified to by Mr. Burbidge, to-wit: the rate of 167,888 tons per year.

PROBLEMS:

At pages 1101-1102, Mr. Greenough testified:

"Q. Assuming that on the 28th of October, 1916, the sum of $4,000,000.00 was paid for the mine, if it would take ten years to work out the $10,000,000.00,

that would be 15 per cent per annum on the $4,000,000,00, wouldn't it?

"A. I don't know, I haven't made that computation.

"Q. It would be $6,000,000.00 profit in a period of ten years wouldn't it, on top of the return of the return of the capital of $4,000,000.00?

"A. I haven't made that computation.

"Q. Well, that is easy to figure. If you paid $4,000,000.00 for it at that time, and it ultimately would pay $10,000,000.00 in profits in the period of ten years, that—there would be $6,000,000.00 wouldn't there, returned?

"A. Yes.

"Q. That would be an average of $600,000.00 per year?

"A. That is correct.

"Q. Or 15 per cent upon the $4,000,000.00?

"A. On the assumption that is correct.

APPELLANT'S HIGHEST CLAIMS OF VALUE.

Throughout the brief, Appellant seeks to hold Mr. Day to a full payment of the highest values estimated and claimed as follows:

Greenough's highest estimate (p. 1059)	$10,750,000.00
Add, total of ore in transit as all profit though we have shown it is not,	1,048,864.14
Add actual cash balance between Hercules and smelter Oct. 28, 1916 (See p. 95)	370,521.13
Add, value of smelter and refinery as set	

forth p. 58 Appellant's brief..... 375,789.70

Total $12,555,174.97

Appellant makes no deductions for excess lengths and widths of ore, bodies, high prices nor erroneous measurements of Mr. Greenough. If these are deducted as heretofore shown, and the high prices which he assumes as fair are permitted to stand, we have the following as the highest which appellant could rightfully claim:

Valuation per estimates .....$ 6,270,108.97
Add Ore in Transit as all profit, which it is not 1,048,864.14
Add actual cash balance above shown.. 370,521.13
Add smelter and refinery 375,789.70

Total $8,065,283.94

According to Greenough's testimony, Mr. Day should receive the amounts hereafter shown upon his investment in the Cardoner interest (basis $5,000,000.00 for the mine and its properties, and $600,000.00 cash):

(a) $5,000,000.00 at 15 per cent for 13.75 years produces:

We add Principal $5,000,000.00
Interest... 8,312,500.00
Cash..... 600,000.00 Total.$15,912,500.00

(b) $5,000,000.00 at 15 per cent for 10 years, yields:
Principal $5,000,000.00
Interest... 7,500,000.00
Cash..... 600,000.00 Total.$13,100,000.00

(c) $5,000,000.00 at 12 1-2 per cent for 13.75 years produces:

Principal $5,000,000.00
Interest... 8,593,750.00
Cash..... 600,000.00 Total.$14,193,750.00

(d) $5,000,000.00 at 12 1-2 per cent for 12 years yields:
Principal $5,000,000.00
Interest... 7,500,000.00
Cash..... 600,000.00 Total.$13,100,000.00

(e) $5,000,000.00 at 12 1-2 per cent for 10 years produces:
Principal $5,000,000.00
Interest... 6,250,000.00
Cash..... 600,000.00 Total.$11,850,000.00

In all these examples we have added the principal for the double reason that the principal must first amortize in a mining investment and if invested elsewhere, the principal is always returned (theoretically).

These illustrations demonstrate that Mrs. Cardoner was overpaid or that she received a sum which was at least a "fair approximation of the actual value as of October 28, 1916," as we have allowed her to claim the impossible—an ideal theoretical return in advance.

By deducting the excess from the ore bodies erroneously assumed by Mr. Greenough, we have heretofore shown that at his prices the valuation should be $6,270,108.97.

Taking his rate—12 1-2 per cent—his shortest time—7.7 years (p. 1100) the result is as follows:

Principal $5,000,000.00
Interest... 4,812,500.00
Cash..... 600,000.00 Total.$10,412,500.00

whereas appellant's valuation would be:

Valuation per estimates	$ 6,270,108.97
Add Ore in Transit as all profit, which it is not	1,048,864.14
Add actual cash balance above shown	370,521.13
Add smelter and refinery	375,789.70
Total	$8,065,283.94

Mrs. Cardoner was overpaid.

WITNESS BURBIDGE.

In appellant's brief point 3, pp. 56 to 98, a discussion of the alleged value of this mine is set forth. In several places counsel attempts to show error in the work of Frederick Burbidge.

Mr. Burbidge omitted the first few years of the mine's life because of the extreme richness of the ore in both silver and lead, and the limited tonnage produced, as well as the high ratio of silver to lead.

Counsel claim this method deals unfairly with appellant.

This witness at pp. 890–907 and especially 901–903, estimates the tonnage and its reasonable value to show that Mrs. Cardoner was not defrauded. In stating the price at which he estimated lead values he says:

> "The period 1907 to 1916 included two boom periods when the price of lead was higher than normal. On the other hand, the cost of production was greater.
>
> "In the five years 1908–1912, inclusive, the net profit per ton of ore mined averaged $3.27. (p. 903).
>
> MR. GRAVES: What was the last period you gave?
>
> A. 1908–1912. This was the period of normal

prices for both lead and silver and labor, and other operating conditions were also normal."

After reviewing the situation, p. 904):

"Taking all these things into consideration as well as the decreasing silver content and the increase of zinc it was only possible to estimate the profit to be made on the remaining ore at from $2.50 to $3.00 per ton.

At other places he shows that his estimates of prices, production, and elements considered in this transaction, are based upon average normal conditions.

At pages 88 to 96 of appellant's brief, it is claimed, among other things, that Mr. Burbidge was unjust to Mrs. Cardoner in not estimating on the higher prices which had prevailed during the war period and the years which he denominated as "boom" years.

We shall not attempt any elaborate defense or praise of this witness. His position in his profession is well known; he ranks with the highest.

But to illustrate that this witness was entirely fair to Mrs. Cardoner and the defendants, and that appellant has miscalculated the value and also to show the errors of Mr. Greenough in his assumed lengths of ore bodies, we shall take the entire productivity of the Hercules mine, through its entire producing period. We are satisfied the results of this consideration will be more disastrous to appellant than the conservative testimony of Mr. Burbidge or the problems heretofore set out.

At page 91 of appellant's brief we find:

"The profits shown by the evidence to that date—October 28, 1916, were $11,915,886.74 to which should

be added $1,048,864.14 for ore in transit which had not been paid for up to that time making a total of profits to October 28, 1916, of $12,964,754.88, or an average profit of $7.29.

Counsel has here stated the error which we noted above, viz: he claims that ORE IN TRANSIT IS ALL PROFITS.

Reference to the tabulation heretofore set out in Statement No. 18 of this brief under the subject "SIZE, VALUE AND EXTENT OF KNOWN ORE BODIES ON OCTOBER 28, 1916" under the sub-head "ORE SHIPPED" shows the great decrease in the per cent of production of both lead and silver as well as the decreasing ratio which silver bears to lead in this Hercules ore; the figures show that the "HIGH-GRADE" originally found in the upper or first workings was far richer in both lead and silver and in the ratio of silver to lead, than either the present "HIGH-GRADE" or the Concentrates. We compare the years 1901 and 1902 with 1915 and 1916:

	TONS		DRY TONS		PER CENT
Year	Wet	Dry	% Lead	Oz. Silver	Calculated
1901	362	329	59.84	132.13	2.28
1902	5003	4840	62.34	83.92	1.34
1915	49442	47783	51.20	39.61	.773
	Conc.		53.14	58.57	1.100
1916	70026	68063	47.29	35.40	.747
	Conc.		47.95	34.33	.715

Note: 1916 calculations to October 28th, 1916, only.

Witness Greenough says (p. 1058):

"It is true that a s we get down on these ore bodies they become somewhat baser, more zinc comes in and more iron, and generally there is a GRADUAL decrease in the silver ratio, that is the amount of silver for each

unit of lead. To get at about what that would amount to, I have made certain estimates. At the beginning of this ten-year period the mill feed carried a ratio of 9.4 ounces of silver for each ten per cent lead content, and at the end of the period the mill feed carried a ratio of 8 ounces silver for ten per cent lead, so that the average silver ratio for the period would be 8.7 ounces for ten per cent lead. This is but a decline of 7-10th of an ounce below what it was at the beginning of the period."

It will be noticed that this witness based his calculations upon the mill feed. He therefore omitted the high grade, for the years 1906 to 1915; he did not calculate the decrease of mineral content nor of the ratio of silver to lead from 1901 to 1905, inclusive. He selected a ten-year period during six of which were two boom periods of prices.

PROBLEM 1.

No better way can be devised for showing the error of plaintiff's attorneys and her witness Greenough on this question of value than by considering the entire mine from its top workings to the Hummingbird tunnel. This perpendicular distance is 2252 feet, but enough ore still remained in the uncleaned stopes to make approximately 50 feet in depth at that tunnel, thus reducing the productive depth to 2202 feet, approximately 2200 feet.

This depth produced:

(a)	Dividends (September statement, p. 1357)	$10,379,527.72
(b)	Estimated dividends in ore in transit	400,000.00
(c)	Cash	370,521.13
	Total	$11,150,048.85

an average of $5,068.20 per foot depth.

Greenough estimates 1650 feet of remaining ore depth $10,750,000.00

But 1650 feet at $5,068.20 per foot is only 8,362,530.00

therefore, he has assumed a greater value per foot depth of the remaining ore bodies than that produced in the richest part of the mine.

Dividing Greenough's estimated remaining valuation—$10,750,000 by his estimated depth 1650 feet, we get an average per foot value of $6515 5-33. This is $1446.95 richer than the production above the No. 5 tunnel, and illustrates his error.

His testimony above quoted concedes that the ore gets leaner with depth.

PROBLEM 2.

In the complaint (Paragraph 6, pp. 18-19) is this allegation:

> "At the time of the transaction, for several years prior thereto, and at the present time, the Hercules properties were and are of the value of not less than $20,000,000.00, and plaintiff is informed and believes and thereon alleges the fact to be, that such properties were and are of the reasonable value of $30,000,000.00."

Plaintiff does not say whether these astounding figures are gross returns or net smelter returns, or dividends. But appellant treats the remaining ore values as dividends—and we shall do likewise.

At the basis above shown, to-wit: $5,068.20 per foot depth, these figures mean, upon the $30,000,00.00 basis, that the mine still has a depth of 5937 feet, which, added to the

2200 feet already worked out, gives a total depth of ore bodies of 8137 feet. Compared with other mines described in the testimony, this is more than twice as deep as the largest ore body ever discovered in that country; is three times as deep as several other mines, and is as high as four times as deep as still others. This depth of 8137 feet is over one and a half miles.

Upon the basis of $20,000,000.00, calculated similarly, the allegation is that the mine still contains a depth of 3958 feet of ore, which added to the 2200 feet already exhausted means 6158 feet, or more than double the average size of the larger ore bodies in neighboring mines, and more than one and one-sixth miles in depth.

Plaintiff failed to produce a single witness to testify to these absurd valuations.

When these depths are compared with Greenough's estimate of 1500 feet below the creek, or 1650 feet depth of remaining ore, it is seen that the $30,000,000.00 valuation approximates 300 per cent, and the $20,000,000.00 valuation approximates 200 per cent of his estimate.

ERRONEOUS ASSUMPTIONS.

At page 42 of appellant's brief, we find:

> "We believe from all the testimony in this case with reference to value, that the following are among the most essential facts necessary to determine the value of the mine, stated in the order of their importance;
>
> 1. Net income year by year, and particularly the present income.
>
> 2. The dvidends declared year by year, and aggregate.

3. The previous history of the mine and its production.

4. The conditions as they appear within the mine on the date value is sought to be proven.

5. The history, production and depth of mines of like character in the same locality or district."

We do not agree with this enumeration and we think it accounts for the false view that appellant has of this case.

If appellant's analysis is correct, upon what basis would he value an unworked but excellent new mine?

We are confident that the following items in their respective order are those which should be considered in determining the value of a mine:

1. The district where located and the history of neighboring mines.
2. The extent, mineral content, permanency and location of ore bodies.
3. The cost and means of extraction, transportation, treatment and the amount of mineral content which can be saved and marketed.
4. The amount of ore extracted and the amount of ore in reserve.
5. Approximate value of probable ore.

ERROR VI. (p.1408) and VII. (pp.1408-1409).

These errors charge that Day was administrator at the time of the purchase, and (Error VI) that he was precluded from purchasing the mining property, and (Error VII) the Burke property by R. C. Idaho, Sec. 5543. This subject is treated at pp. 98-99-100 appellant's brief.

The pendency of the administration at the time of the purchase, is disproven by these facts:

October 11, 1916—Decree of Final Distribution made and filed in the Probate Court of Shoshone county, Idaho; Mrs. Cardoner was represented by her attorney, John P. Gray, and his assistant, Mr. McNaughton; the administrator was represented by his attorney, John H. Wourms;

October 14, 1916—Actual possession of property was delivered to Mrs. Cardoner; the administrator settled with her; she appointed Allen as her agent; and notified E. R. Day and John Wourms thereof;

October 14, 1916—Allen, as agent for Mrs. Cardoner, checked E. R. Day's administrator's account (Allen, pp. 595 to 599);

October 16, 1916—Mrs. Cardoner discussed the sale of her interests with her agent, Allen, for the first time (Allen, pp. 599-600), and asked Allen if he would see what he thought she could get for it; she told Allen she thought Gene Day might but it (p. 600-bottom).

Thereafter, Allen got Day's receipt (Exhibit No. 13, p. 1185), and discussed the sale with him. (Allen, pp. 602 to 604);

October 21, 1916—Allen saw Mrs. Cardoner and told her what Day had offered, and discussed getting a higher price for her interest, (pp. 604 to 606), and advised her to consult with Paulsen and Hutton, (p. 606);

October 25, 1916—Certified copy of Decree of Distribution recorded with County Recorder;

From October 21 to 27, 1916—Allen saw Mr. Day several times and demanded one-sixteenth of $6,000,000.00

for the Cardoner interest; Day refused to buy the interest for that sum, telling Allen when he made his last offer that he (Day) was through, to offer it to someone else.

E. R. Day, pp. 736-737-804;

Allen, pp. 604-605; 610; 616-617;

October 27, 1916—Mrs. Cardoner came to Wallace (Allen, p. 611), and saw her agent, Allen, who told her —"I told her that I had put the proposition up to Mr. Day on a $6,000,000.00 basis and he absolutely refused to consider it." (p. 616).

Mrs. Cardoner and Allen then fixed the final price (p. 617), but thereafter, the Burke property was raised $5,000.00 (pp. 618-619) at Mrs. Cardoner's express request (pp. 618-619);

October 28, 1916—Option contract and deed made; payment of $50,000.00 on contract accepted by Mrs. Cardoner. This was to be forfeited in the case the purchase was not completed;

October 29, 1916—At the Old National Bank in Spokane, Washington, Mrs. Cardoner paid Allen $5,000.00 as his commission without denying that he was her agent.

Vincent, p. 698-702;

Allen, pp. 662-664;

November 1, 1916—Formal order of discharge of administrator duly entered;

November 14, 1916—Balance of purchase price ($320,000.00) paid.

It is thus seen that the decree of distribution was made and filed and actual possession of the estate was delievered to the

heir, who appointed a new agent and notified E. R. Day thereof, before any negotiations for the sale were begun. It further appears that the decree of distribution was recorded prior to the conclusion of the contract; and the payment of practically 87 per cent of the purchase price—the last payment—was made after the technical discharge of the administrator had been duly entered.

The decision upon this question (pp. 1376-1381) is so clear and exhaustive that we cannot add to its lucid statement or convincing power. His conclusions are sustained by the authorities there cited, to-wit

Wheeler v. Bolton, 54 Cal. 302.
Moore v. Lauff, 158 Pac. 557;
Morfew v. S. F. & S. R. R. Co., 40 Pac. 810;
Buckley v. Superior Court, 36 Pac. 360.

See authorities under Point V Page 76

Moore v. Lauff, 158 Pac. 557 (558-559) holds that a complaint showing final decree of distribution and delivery of estate to heirs who divide the property, shows that the estate has been closed, that the holder of a note so distributed is the legal holder and that it does not belong to the estate. An appeal based upon the opposite contention was dismissed as frivolous, with penalty.

The court says (158 Pac. 559):

"(6) As stated above, there is absolutely no merit whatever in this appeal, and it would be an unjust imputation against counsel for the appellant, to hold that he did not realize the utter futility of the appeal when taking it. We may therefore properly assume that the appeal was designed to accomplish no other purpose than to delay the execution or satisfaction of the judgment.

Accordingly the judgment is affirmed with damages awarded against the appellant in the sum of $50.00"

ERRORS NO. VIII (p. 1409) and IX (p. 1409).

These assignments challenge the sufficiency of the evidence to show that Mrs. Cardoner was informed of the known conditions and facts bearing upon the value of the property; and, that the price paid approximated its reasonable market value.

These questions have been considered in discussing Errors No. II.-III.-IV.-V.- and X.

At pp. 1400-1401, Judge Dietrich says:

> "Upon consideration of the entire matter, my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, and in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required."

The insistence with which appellant's counsel assail this finding impels a brief summary of facts showing,

MRS. CARDONER'S KNOWLEDGE:

1. About 1883, she came to San Francisco from Spain.
2. In 1886, she lived at Murray, Idaho, in the Coeur d'Alenes and ran the store there, while her husband went to Burke, Idaho, where she later joined him;
3. From 1886 to 1906 (twenty years), the Cardoners lived at Burke, in close proximity to the Hercules,

Tiger-Poorman and the Hecla mines; and in the same vicinity as the Standard, Mammonth, Gem, Frisco and Black Bear mines;

4. They acquired a 1-16 interest in the Hercules mine before it began paying dividends;
5. In 1901, the mine paid its first dividends, aggregating $8,000.00 , of which they received $500.00;
6. In 1903 Mrs. Cardoner filed her divorce suit alleging the value of the mine at $2,000,000.00, and showing that Mr. Cardoner owned a large interest in the Hummingbird—an adjoining claim;
7. In 1906, the Cardoners moved to Spain. At that time the ore shipped by the Hercules had yielded net smelter returns of $3,690,539.57, of which $2,410,300.00 had been paid in dividends, the Cardoners receiving $150,643.75 as their share;
8. From 1906 to 1916, and during their residence in Spain, the Cardoners received the regular monthly statements; subscribed for and read the Press-Times of Wallace, Idaho, and the Spokesman-Review of Spokane, Washington, and other mining papers, and kept in close touch with all matters pertaining to mining in the Coeur d'Alenes;
9. The September, 1916, statement, which Mrs. Cardoner had, when she sold, showed dividends declared and paid aggregating $10,379,527.72, of which the Cardoners' 1-16 was $648,720.48, and in the sale she received an additional $350,000.00 for her interest in the mining properties and cash, aggregating $998,720.48, which their part of the mine had yielded.

10. From April to October, 1916, Mrs. Cardoner was in constant touch with the mine management; and her co-owners Eugene R. Day, Paulsen, Hutton, and her agent, Allen, discussed with her the smelter, refinery, ore in transit, cash on hand, improvements made at the mine from 1906 to 1916, giving her accurate and reliable information;

11. She knew the mine was practically worked out to the No. 5 tunnel, a depth of 2252 feet; she knew the depth of adjacent mines (Allen, p. 612 et. seq.), and therefore knew that the Hercules had exhausted a greater depth than the Tiger-Poorman had when it was closed down, and that such depth (2252 feet) was greater than several other mines;

12. Eugene R. Day told her the probable depth of ore bodies below the No. 5 tunnel; of the disclosures of ore from the workings below that tunnel, and of the advantageous position the company occupied by its ownership in the smelter and refinery, etc.

13. In 1904, her husband joined in the option to Adams (basis, $4,000,000.00) for the property, and from 1904 to 1916 the ore extracted yielded $20,001,406.10, net smelter returns, from which dividends were paid aggregating $10,019,527.72, of which the Cardoners received $626,220.48;

14. After Hutton told her he estimated the mine still worth $4,000,000.00, she had Allen, her agent demand $6,000,000.00 from E. R. Day under the threats heretofore shown; upon Day's refusal to pay this price and informing her to sell elsewhere, she acted with her agent and fixed her own price at a

basis $5,600,000.00 for the mine's properties and cash;

15. From 1886, when the Cardoners first settled in the Coeur d'Alenes, to 1916, the date of the sale, is thirty years, and in that period, the entire Coeur d'Alene district was discovered and developed and Mrs. Cardoner kept accurately informed as to mining matters within the district;

In view of these facts counsel's argument "that she had no inforamtion, etc.," overtaxes credulity.

ERROR X.

INNOCENT PURCHASERS.

Appellees Harry L., and Jerome J., Day, respectively, purchased an undivided one-fourth interest in the former Cardoner interest, between October 28th, and November 14th, 1916, paying in full therefor on November 14th, 1916, prior to any notice or claim of any fraud in the original transaction.

Separate deed to each was executed by Eleanor Day Boyce on January 5th, 1917, and by Edward Boyce on April 5th, 1917, and recorded April 9th, 1917. (R. p. 967).

The defense of innocent purchaser is interposed by them, severally.

Pomeroy's Equity, 4th Ed., Vol. 2, Sec. 691, says:

> "In the United States a different, and it seems to me, more just rule has generally been established,—that where the estate subsequently purchased is the legal estate, a notice in order to be binding, must be received before the purchaser has paid the price. * * * [f

he actually pays the valuable consideration without any notice, a notice afterwards given does not preclude him from completing the transaction, obtaining conveyance of the legal title and thereby securing the precedence due to bona fide purchaser * * * without notice."

See also, Pomeroy's Eq. 4th Ed., Vol 2, Sec. 755, Note 5-a.

U. S. v. Detroit T. & L. Co., 200 U . S. 320-321; 50 L. Ed. 499; aff'g. 131 Fed. 668.

Each of these purchasers had a right to presume good faith in the original transaction and that everything had been properly done; the large price paid to Mrs. Cardoner, which Harry L., and Jerome J., Day each regarded as excessive was ample proof to them that appellant had been liberally and fairly dealt with.

Appellant's brief (pp. 23 point 5; 25, point 6; and 101) treats this subject upon the theory that E. R. Day was agent for the other members of the Day family in this transaction. E. R. Day (pp. 802-810) and Harry L. Day (pp. 980-981) testified to the contrary and their evidence is not disputed.

Furthermore, the record shows (pp. 981-982) while Harry L. Day was testifying:

Q. I will ask you Mr. Day whether it is true, and if not to what extent it is not true, the assertion or suggestion that everything that one of you three brothers goes into that all the rest go in with your sister, and are partners in everything?

A. It is not correct. I am interested in a number of properties which the others are not interested in. Some are with me and some are not.

Q. Just illustrate the situation briefly.

A. Well, my brother is,——

Mr. Graves: In view of the testimony which Mr. Day has given as to this transaction, may it please the court, I am perfectly willing to waive any claim of that sort that may appear in the pleadings, or in any part of the contention if that will shorten things.

* * *

Mr. Graves: I will waive any contention of that sort if it appears anywhere in this proceedings. I don't remember that it has appeared.

Mr. Babb: Well, I would have to have it waived absolutely whether it is plain that it appears anywhere in this proceeding or not.

Court: It is understood that it is waived absolutely.

Mr. Graves: I am just waiving the contention that what one of them went into always, the others went into.

This partnership between the co-owners of this mining property was not a general partnership; it has many incidents not like those of a general partnership.

Here, Mrs. Cardoner's share of the property was not held by Eugene R. Day in trust. Each partner owned his interest in the property itself, in severalty. Mr. Day managed the partnership business, only, viz: the working of the co-owners' property; he had no ownership of the several interests owned by the respective partenrs, nor was he trustee for that purpose. The distinction is clearly drawn in,

Perry on Trusts, p. 316, Note A.

Bissell v. Foss, 4 Fed. 694; aff'd 114 U. S. 252; 29 L. 126.

Furthermore, E. R. Day did not conduct this sale,—did not as trustee, but at his own sale. Mrs. Cardoner conducted her own sale of her separate interest, to a mining co-partner —not to a general co-partner.

Mills v. Mills, 63 Fed. 511.

Cole v. Stokes, 113 N. C. 270.

Bissell v. Foss, 114 U. S. 252 (supra).

From Bissell v. Foss, 4 Fed. aff'd 114 U. S. 252; 29 L. 126, we quote these expressions relative to mining partners:

"Each was at liberty to purchase from the other * * * as a stranger might" (p. 699); "The parties were in a very large sense involuntary associates" (p. 701); "They came together on the ground that they were tenants in common of the mine and not upon any agreement to engage in the business" (701); "were partners in the working but not in the ownership, * * * and their firm was a thing of the hour without hope of existence. * * * The object .. was to take out ore * * * Beyond that that were entirely free to act touching their interest in the mines, as well as other individual property."

ERRORS IN APPELLANT'S BRIEF:

Appellant's brief contains many plain errors which we deem necessary to point out:

1. Constant reference is made to "mines," "refineries," "smelteries," "mills," etc. This case involves ONE mine, ONE mill, ONE refinery and ONE smelter.
2. At page 68 of brief, appellant misquotes, and does

not complete Burbidge's testimony. Compare Burbidge p. 904-901;

3. At p. 45 et. seq. brief says: "An analysis of these exhibits shows that the information as to the net income of the mine is not given." Compare Allen pp. 612-613; 643-644 et. seq. and the March, 1916 statement;

4. At pp. 48 and 49 erroneous conclusions are stated as to the years 1915 and 1916. Compare anaylsis of September, 1916, statement heretofore set out; also items making up the balance shown therein;

5. At p. 52 appellant misconstrues E. R. Day's testimony, and by quoting only part of it, gives a wrong impression concerning same. Compare E. R. Day pp. 860 to 808 inclusive;

6. At p. 46 appellant gives the impression that dividends were suppressed in 1915 and 1916. The reason of small dividends during those years was explained to Mrs. Cardoner by Paulsen, Day, etc.;

7. At p. 47 counsel argues calculated production after the sale. This is improper;

8. At p. 47 the impression is given that the Hercules will be worked in the future at the rate during the war, and hence, will exhaust the entire ore bodies in about three and one-half years;

9. The ore in transit is persistently repeated as "all profit."

10. At page 53, point 5, appellant says Burbidge testified that the Tiger mine was sunk 2200 feet and that Day told Mrs. Cardoner that it was only sunk 1500 to 1600 feet. Burbidge said the mine paid only to

a depth of 1800 feet below the creek level (p. 901) and Day told Mrs. Cardoner its depth was from 1500 to 1800 feet below the creek level;

11. At p. 58 appellant treats the listed property as no part of the mine. The testimony is otherwise.

12. At p. 88 and 89 counsel assume a continuous profit upon war prices, which of course cannot continue;

13. At pp. 90 to 95 the argument is made that several million dollars had been spent for development, machinery and equipment that would not have to be duplicated. The evidence does not show what it would cost to rehabilitate the smelter, the refinery, or to replace other broken and worn machinery. In addition, the mine was changing from a tunnel to a shaft mine with added operating costs.

14. At pp. 92 and 93 counsel repeats his error charging that approximately one million dollars has been spent for property not connected with the mine. The evidence disposes of this statement.

15. At p. 83 the statement is made that Jerome J. Day * * * "testified to numbers of mines that had been failures in the Coeur d'Alene district." This is a misconstruction of his testimony. He stated these mines are in the vicinity of the Hercules, some of them adjoining. (pp. 1006-1010).

16. At pp. 23, point 5, and 25, point 6, appellant says that Eleanor Day Boyce pleads innocent purchase. She made no such plea.

17. At pp. 44 and 45 counsel argue that Mrs. Cardoner received her sole information of net income, etc., from Eugene R. Day and the statements. This dis-

regards Allen's testimony at p. 612 et. seq.; also 643 et. seq.

18. At pp. 43 to 47 et. seq., it is said Mrs. Cardoner had a right to believe, unless other wise informed that the dividends would approximate the earnings, etc. The monthly statements and the tabulated sheet heretofore set out refute this. These items were never coequal.

Other errors might be pointed out in appellant's brief but space forbids.

We respectfully submit, that the decision (pp. 1373-1401) is remarkable, for clearness of diction, elegance of expression, lucidity of narrative, comprehension of detail, nicety of analysis, fairness of consideration, soundness of logic and justice of conclusion.

We respectfully urge that it be affirmed.

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Attorney for Jerome J. Day.

No. 3273.

United States
Circuit Court of Appeals
For the Ninth Circuit

MATHILDE CARDONER,

Appellant,

vs.

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Appellees.

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STATEMENT OF THE CASE.

In addition to the statement of the case appearing in the decision of the learned Judge of the District Court, (Record

pages 1373 to 1401, inclusive), only brief references need be made in this statement to the record on appeal. However, certain specific allegations of the amended bill of complaint will receive consideration in the argumentative part of this brief.

The original bill of complaint was filed on the 5th day of April, 1917, to which the appellees Eugene R. Day and Eleanor Day Boyce filed their answer.

Subsequently, and on the 4th day of June, 1917, appellant's amended bill of complaint was filed. (Record pages 9 to 54, inclusive). The answer of the appellees Eugene R. Day and Eleanor Day Boyce to this amended bill will be found in the record, pages 170 to 220, inclusive.

The appellees Edward Boyce, F. M. Rothrock, L. W. Hutton, August Paulsen, F. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Loebaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan and Blanche Day Ellis also caused their answer to the amended bill to be filed and served, (Record pages 220 to 251, inclusive), showing among other things that such bill did not state facts sufficient to constitute a valid cause of action in equity or a cause of action at all against them or any of them, and that they had been improperly joined as defendants, and that each of them had been improperly joined as a defendant in the appellant's suit. No effort was made at the trial to connect them or any of them with the transaction or to show that they or any of them had any interest in the property conveyed by the appellant by her deed, a copy of which was exhibited as a part of both the original and amended bills.

It will be remembered that the mining claims commonly known as and called the "Hercules Mine," and which had been

developed, worked and mined by the Hercules Mining Company, were owned by the individual partners therein, each having a certain undivided interest in such claims, and that the partnership had become the owner of certain property consisting of mining, smelting and refining stocks, ore in transit, cash reserves, etc. By the decree of distribution of the date of October 11, 1916, there passed to the appellant an undivided one-sixteenth interest in these lode mining claims, also in the property and assets of the Hercules Mining Company, which interest she subsequently conveyed to the appellee Eugene R. Day by her deed to Eleanor Day Boyce of the date of October 28, 1916.

In the answer of Eugene R. Day and his sister, Mrs. Boyce, to the amended bill, (Record pages 208 to 220, inclusive), there will be found a brief history of Mr. Day's connection with the Cardoner estate; also an account of his imparting to the appellant, during the numerous conversations had between them in the year 1916, from the month of April up to the 14th of October, when he turned over to her the property of the estate, all the information he had relative to the Hercules Mine, including its present development and future possibilties, and the assets and property holdings of the Hercules Mining Company. These averments in this answer were fully and convincingly proven at the trial, where it developed that Mrs. Cardoner had received for her property the full value thereof, and at the time of the execution of her deed was in possession of all the information and knowledge possessed by Day relative to this property and the merit and value of the same.

ARGUMENT.

In a case of this character where the effort was made to

rescind a deed which was deliberately executed and freely delivered and where the consideration therefor represented a full and satisfactory price for the property conveyed, the first inquiry which suggests itself is: What was the primary purpose or initial motive that incited the commencement of the suit?

The uncontradicated evidence shows that appellant on the 28th day of October, 1916, executed the deed conveying the property mentioned therein to appellee Mrs. Eleanor Day Boyce, and then and there, as a part consideration for the sale of her property, received a cash payment of $50,000.00, and executed an escrow agreement providing for the deposit of this conveyance with the Old National Bank of Spokane, Washington, on condition that the same should be delivered to Mrs. Boyce, upon the payment to such bank by her of the additional sum of $320,000.00 for appellant, on or before the 28th day of November, A. D. 1916; that on the 14th day of November, 1916, Eugene R. Day and Eleanor Day Boyce went to the Old National Bank, where appellant had deposited such deed in escrow, and paid to the officers of the bank the amount mentioned in the escrow agreement, to-wit, the sum of $320,000.00, and received from the officers of the bank the deed.

On November 6, 1916, the appellant went to Albuquerque, New Mexico, from which place, on the 26th day of November, 1916, she wrote to appellee Eugene R. Day the following letter:

> "Albuquerque, N. M., Nber 26, 1916. Mr. Eugene Day, Wallace, Idaho. Dear Mr. Day: As I promised Mrs. Boyce that I would write her after arriving at my destination and failing to find or remember her address, I ask of you to give her my present address which is, 709

East Central Avenue, Albuquerque, N. M. Tell her that it is the best place on earth for sick people, as the climate is very dry and sunny; since I am here I did not see any snow or rain.

"I am surprised to see such a nice weather, it was impossible to find a furnished apt. for rent, everything was taken, the season commencing in Sept. I bought a nice little bungalow and have the sun all around every day; many persons told me I would cure my asthma here, some of them came very sick and are entirely well, and stay here, it will take a few years to obtain a cure.

"I am sure Mrs. Boyce will like the climate, tell her to try, she will be very pleased. I sent for my boxes, who are in New York, and expect them for next month, so I will have a guest room.

"My best regards to Mrs. Boyce, and sincere salutations for you, and all the family.

"Yours very truly,

(Record page 500.) "M. CARDONER."

Up to this time she had no complaint to make as to the price she received for her property, and apparently held Mr. Day and his sister in high esteem; but whom she subsequently, in her bill of complaint filed in April, 1917, charged with the grossest fraud and conspiracy.

To bring about this radical change of feeling on her part, one would naturally expect that there had been disclosed to her some information with reference to the deeded property and the value of the same that she had not received prior to the date of the execution of her deed, or that there had come to her attention reliable facts, from disinterested sources, touching the conduct upon the part of such appellees as would necessarily

destroy her confidence in their honesty and her belief in the fairness of the treatment they had accorded to her. But nothing of the kind was imparted to her; on the contrary, the record nowhere shows any reason to justify her change of attitude. Up to the 4th day of December, 1916, the relations of these parties were most friendly, everything was calm, peaceful and satisfactory with her so far as concerned this transaction, when Mr. Joseph R. Wilson, an attorney of Philadelphia, appeared on the scene at her home in Albuquerque; at which time he learned from her that she had a large sum of money in the Old National Bank in Spokane, that had come from a sale of the property she had received from her husband's estate, and being advised as to the sum for which she had sold the property, he told her that the price which she had received was inadequate, and this seems to be the first suggestion that had reached her calculated to make her dissatisfied with the sale. The unreliability of such advice is illustrated in the fact that it nowhere appeared in the record and no time at the trial, that Mr. Wilson knew anything about mining in the Coeur d'Alene District, or that he had ever visited the Hercules Mine, or properties, or had any personal knowledge or information whatever concerning the value of the property conveyed by appellant. He testified that he based his statement as to the inadequate price upon some conversation he had with her husband in 1913, at which time her husband, while stopping at his office, took a check for a large sum of money out of his pocket and said: "That is a pretty big sum of money." How big the same was or where it came from we are not advised. The Lower Court recognized the utter incompetency of this conversation as to fixing a valuation on the property sold, stating that it was admitted only for the pur-

pose of showing diligence on the part of the appellant in the matter of rescinding her contract, and counsel for appellant in open court admitted that it was not offered for the purpose of fixing valuation but for the reason as suggested by the court. (Record page 577). Therefore, the admission of her counsel as to the fact that this conversation did not disclose the valuation of the property which she had sold, is conclusive acknowledgment that Mr. Wilson in this conversation had not imparted to Mrs. Cardoner any information from which she could have drawn the conclusion that the price she received for her property was not at least the value of the same.

Subsequent to this conversation with Mrs. Cardoner in New Mexico Mr. Wilson proceeded to Spokane to take up the matter of investing the money which she had on deposit in the Old National Bank, and at the same time to make inquiries with regard to the property she had sold. After making inquiries in Spokane, Wallace and Burke, (the nature of which or the reliability or character of his information obtained therefrom not being disclosed in the record), he returned to Albuquerque and as a result of what he told her she decided to bring this suit. (Record page 579.)

Not being able to impart to her any personal information or knowledge in the premises, and she having instituted her suit upon the hearsay statements of Mr. Wilson, it is not strange that until the time of the trial appellees were at a loss to understand the influence that actuated Mrs. Cardoner to file her bill of complaint with its libelous besmirching of the characters of Eugene R. Day and his sister, Mrs. Boyce, and its false attack upon their unimpeachable honesty and integrity.

The motive which impelled Mr. Wilson to induce Mrs.

Cardoner to the filing of her bill of complaint developed upon cross-examination, when he reluctantly admitted that he had a contract with her to the effect that he was to receive a one-twelfth interest in all the property she might recover as a result of her suit. Thus, it will be seen that Mr. Wilson, the inspiring genius of this litigation, was to profit to the extent of a one-twelfth interest in the property for which she had received the princely and munificent sum of $370,000.00, providing she was successful in having her freely and voluntarily executed conveyance rescinded. (Record page 585.)

The first step that he took in connection with the bringing of the suit was to retain Mr. O'Brien of New York and Messrs. Graves, Kizer & Graves of Spokane. Then followed in chronological order the filing of her bill of complaint and amended bill, both containing the maximum of false averments, some of which were abandoned and none of which were proven at the trial. No one that it was deemed necessary to connect with the transaction, in order to state a cause of action, was left out of these pleadings. Her lawfully appointed agent, Allen, and other members of the Hercules partnership than the Day brothers and their sister were made parties defendant, notwithstanding the fact that such partners had no interest whatever in this transfer and in no manner participated in the negotiations leading up to the same.

In this connection the apt language of Judge Beatty in McCarthy v. Bunker Hill Mining & C. Co., 147 Fed. 981, on page 983, comes to mind:

> "The wild assertions of complainants are without justification. They cannot shelter themselves behind the flimsy veil that they believed them, because so told. A man must have some reason for his belief before assert-

ing it as a truth. It seems by some to be considered admissible practice in litigation to assert anything, regardless of the truth, that will constitute a non-demurrable case. It is a duty that counsel owe to the courts to see that their clients present to them only the truth. Courts will endeavor to see that no man shall succeed through misrepresentation."

Before referring briefly to a number of the abandoned and disproven allegations of the amended bill of complaint it may be well to state that the examination of the appellant at the trial proved that she was: Keenly intellectual; extensively traveled; unusually familiar with the laws and customs of Idaho and of the United States; accurately acquainted with the property interests of her husband and the income derived therefrom; intimately familiar with his business enterprises and his methods and manner of conducting the same; tenaciously assertive as to her rights; a native born French woman possessing in a very large degree the thrift and persistency that characterize the people of the country of her birth, and, that she spoke the English language fluently and wrote it with remarkable accuracy.

ALLEGATIONS OF AMENDED BILL.

In Paragraph V of the amended bill it is alleged that appellant was unacquainted with the business customs and laws of the State of Idaho or of the United States, and that her deceased husband in his lifetime managed all his business affairs and the property of the community and never gave her any definite information concerning the values or earnings of the same, yet the record fully discloses that she was well acquainted with both Federal and State laws regarding her

personal and property rights; that she had detailed and specific information as to the community property, and the income therefrom, and that she assisted her husband in his mercantile business and that he left her in charge of the same.

On January 7, 1903, appellant filed a complaint in her divorce proceedings against her husband, in which she alleged in detail and with particularity the property owned and held by him, the value thereof, and the income derived from the same, which she averred was community property acquired since their marriage, (Record page 463), and at the trial of that suit on direct examination by her attorney, testified as to her husband's stock of merchandise and the value thereof and his houses and property at Burke and the income therefrom, and in reply to the question as to whether she ever helped him in his store, stated that while in Murray she worked in the store all the time and while at Burke he left her in his store. And on cross examination she swore that he paid for the merchandise and goods which he purchased in his business with borrowed money; that he was always hard-up because he bought more goods than he could pay for, and that she many times told him that if he did not buy so many goods he would not owe so much money. (Record page 465).

The record further shows that she had lived many years in the United States in close association with the business interests of her husband; that she voted in Idaho, and knew of her American citizenship by reason of her husband's naturalization and that she carried his original naturalization papers with her when she returned from Spain to the United States, and that at the time of landing at New York she exhibited to the immigration officers such naturalization papers. And the record also shows her familiarity with her husband's mining

business, which he engaged in after returning to Spain in 1906, (Record page 471), and that there had been furnished to him during his life time for many years, monthly statements of the business transactions and property interests of the Hercules Mining Company, which enumerated the monthly shipments of ore, receipts, disbursements, and the dividends paid, and properties and stocks purchased from the beginning of the company's operations; and her first inquiry, upon arriving in Wallace, Idaho, in April, 1916, when she first visited the office of appellee Eugene R. Day, was about the monthly statements that she had not received since her husband's death, (Record page 327), and that she was furnished with these statements from the latter part of the year 1915 up to and including the month of September, 1916.

Judge Dietrich referred to this feature of appellant's case in the following language:

> "With much alacrity, I thought, and with unnecessary frequency, the plaintiff, in testifying, sought to give the impression that she knew nothing about business customs in general or about her husband's business or the Hercules mine in particular. Admittedly her husband regularly received the monthly statements which the company had long been accustomed to send to its members, upon which were shown not only the summarized items of operating receipts and disbursements for the month, but the aggregate of all dividends paid during the entire life of the mine. It is true that when upon cross examination her attention was directed to the contents of these statements she explained that she could not understand, and perhaps did not read, them, but in that connection it is thought to be significant that when upon her

direct examination she was first asked why she called Day up by telephone immediately after coming to Spokane, and why, according to appointment, she went to Wallace two days later, she answered, 'To see Mr. Day and ask him for the statements. Since Mr. Cardoner died he never sent us any more statements, and I went up to ask him for the statements.' It is difficult to avoid the belief that she was measurably familiar with these monthly statements, and was able to interpret them in their main features. Plainly she is not without some aptitude for, and experience in, business matters. She seems to have been careful and methodical, and even exacting, in respect to other transactions brought into evidence. She was quick to discover apparent discrepancies and inconsistencies in the administrator's accounts, and proceeded in an intelligent way to procure explanation and rectification. She kept a diary with unusual care, required receipts for disbursements, and altogether made inquiries and gave directions, not in the language of an unsophisticated woman, but in terms signifying that she was not a stranger to business transactions. It is not a case where the principal is at a distance and wholly dependent upon the information furnished him by his agent or associate, or is a stranger with no one to whom to turn for assistance or advice. The company's mill was within a few moments walk from the offices at Wallace, and the mine a few moments ride upon the train or by automobile. They were at all times accessible and open to the plaintiff; and so were the books and records of the company. Of this there is no question. She had agents at Wallace, and she had acquaintances and friends. If she did not understand

an item in one of the monthly statements she could as readily and as reasonably have asked Allen for assistance as in the case of the administrator's account; or she was abundantly able to employ service of that character." (Record page 1386.)

It is next alleged in the amended bill that appellant on several occasions sought to ascertain from the appellee Eugene R. Day, while administrator of her husband's estate, the value of the property she subsequently deeded to Mrs. Boyce and the average returns therefrom, and that he evaded her inquiries, and that during the progress of the administration he inquired of her if she wished to sell her interest in the partnership property, and that she declined to consider a sale thereof. All of which was specifically disproven at the trial, and further, it was testified that she was repeatedly advised as to the property of the Hercules Mining Company and as to the condition of the Hercules mine, and that Eugene R. Day imparted to her all the information and knowledge he had concerning this property, the development thereof and the future prospects of the same.

The Lower Court, referring to this feature of the case said:

"For Day to have repeatedly denied her information about the Hercules would have been a flagrant violation of his duty both as manager and as administrator, on account of which the plaintiff might very reasonably, and I think would, have been deeply offended. Yet so far as appears she made no complaint to her friends or to her attorney, nor did she suggest criticism of him as manager to her associate owners, Paulsen and Hutton. Instead

she seems to have continued to hold him in high esteem, and to entertain for him a friendly feeling, until, after going to New Mexico in December, she was advised by her attorney from the East (acting in perfect good faith, I doubt not) that upon inquiry he believed that the price she had received was inadequate. Furthermore, if we credit her story, we must also believe that, without suspicion or resentment against him, notwithstanding the ill treatment which she now charges at his hands, upon five days consideration she sold to Day the very property concerning which he had persistently denied her information, and upon representations chiefly made by Allen, whom she looked upon as Day's agent. However tenderly we may regard her rights by reason of her sex and widowhood, we cannot give credence to the incredible. From the whole record I am convinced that from the beginning she was aware of the smelting enterprise, and was concerned about it. The mine had been shut down for some length of time in 1915, because of the smelter controversy. Her husband had not looked with favor on the company going into the smelting business, and upon his death she would be likely to succeed to his views. Not unnaturally, therefore, at her first interview with Day she would raise the question, and quite as naturally, as manager, he would defend the new enterprise and explain the reasons which induced him and the other owners to undertake it. Such explanation and defense would almost of necessity lead to a comprehensive account of the mining operations, the condition of the mine, and the future plans and prospects of the company, and in giving it, Day's natural inclination would be to paint a bright, rather than a gloomy, out-

look for the property. Such, I say, are the probabilities, and such in substance I believe to be the facts." (Record page 1389).

It is next alleged that immediately after the close of the administration, in the latter part of October, 1916, appellant was approached by the appellee Harry R. Allen, who, in the transaction which culminated in the sale of her interest, was acting under the direction and in the interest of appellees Eugene R. Day and Eleanor Day Boyce. This seemed to have been the corner stone upon which in the first instance she rested her suit, thereby charging bad faith in dealing with her and a conspiracy between her agent Allen and Day and his sister to defraud her. She must have known and did know that this was not true at the time of filing the amended bill. In fact, Mr. Graves, one of her solicitors, in his opening statement, admitted that they could not prove such allegation. Let his language speak for itself:

> "Now, it may be that in the actual proof of the case we may not be able to show that Mr. Allen was in fact the agent of Mr. Day. I am inclined to think it is not unlikely we may be unable to show that." (Record page 290).

No excuse was made at the trial for the making and publication of this false and libelous charge against her duly authorized agent who acted with the utmost zeal and characteristic good faith in the sale of her property, not only for its full value, but for a price in excess of what she could have received elsewhere.

No attempt was made at the trial to justify this infamous attack on the fair names and reputations of Eugene R. Day and his sister, Mrs. Boyce, who were prominent and respected

mine owners and operators in the widely known Coeur d'Alene District. It must have been known at the times of the filing of the original and amended bills of complaint that appellant could not prove this averment as well as at the time of the trial. Why was it therefore injected into these pleadings and given publicity to the mining world if not for the sole reason of trying to besmirch the reputations of these people who, for years had been her friends and the friends of her deceased husband who trusted them implicitly, and who never in any way, by word or deed, had been betrayed by them. Where did Mr. Wilson get the inspiration and where did Mrs. Cardoner secure the information on which to make this allegation? If they knew it could not be proven at the trial, and it was not incorporated in the pleadings with a view to defaming these appellees, it must have been placed therein for the purpose, as suggested by Judge Beatty, in another case, to bolster up and make non-demurrable the amended bill of complaint.

Allen specifically denied that he was ever the agent, or in the employ of Eugene R. Day or his sister, and emphatically denied that he approached appellant upon the proposition of selling her property; but on the contrary testified that on the 16th day of October, 1916, while on the train or boat going from Wallace to Spokane, she approached him upon the subject of selling the property that two days before had been turned over to her by the administrator, Eugene R. Day, and requested him to see Day and see if he would not become the buyer thereof.

Mr. Day also with emphasis denied that he had ever asked her if she wanted to sell this property and testified that the first he ever knew anything about her wanting to sell it was when Allen, her agent, approached him on this subject, about

the 18th or 20th day of October, 1916, and he was surprised at her offer to sell, as it was his understanding that this property was to be divided between the appellant and her daughter, Bertha, and that they were to remain in the Hercules partnership as partners therein.

Notwithstanding the fact that there had been paid to the Cardoner estate during Day's administration thereof by the Hercules Mining Company $105,500 in dividends, which sum, together with other funds, appellant, on the 14th day of October, 1916, received from Mr. Day when he delivered to her the property of the estate pursuant to the decree of distribution, yet she alleged in her amended bill that during the progress of the administration of her husband's estate the distribution of profits of the Hercules Mining Company was purposely postponed in order to mislead her as to the earnings and value of the Hercules mine. There was not a syllable of testimony introduced on behalf of the appellant at the trial to support her allegation, and the record abundantly discloses that at the time it was made a part of her amended bill she must have known it was not true. There was introduced in evidence by her counsel six monthly statements issued by the Hercules Mining Company, admittedly received by her from Day in April, 1916, each of which contained a statement of the earnings of the mine, the properties of the company, and of the dividends paid from its earliest operations. She was also informed by Day that by reason of the expiration of the company's smelting contract with the American Smelting & Refining Company and its inability to secure another equally satisfactory, it was necessary to suspend mining operations for a period of time during the year 1915, and that in order to place the owners of the Hercules mine in an independent position as to the matter

of smelting and refining their ores there had been purchased the interests in the Northport smelter and the Pennsylvania refinery.

Furthermore, in her conversation with Paulsen in October, 1916, prior to the date of her sale, in reply to her remark about dividends not having been paid for the last few months, he stated to her that the Hercules Mining Company had gone into the smelting business and had branched out; that a reserve had to be built up to take care of these additional business propositions; that the company had a large amount of ore in transit to the smelter which had not been settled for and did not have such a big surplus on hand at that time.

Outside of her statement that Day had asked her if she wanted to sell her interest in her husband's estate, (which testimony Day emphatically denied), there is no evidence of any negotiations pending for the sale of her interest prior to the time that her agent, Allen, at her request, broached the subject to Day of the purchase of her one-sixteenth interest in this property, cleverly suggesting that unless Day purchased it, they would offer it to Paulsen, then to Hutton and then to the American Smelting & Refining Company. Under such circumstances the absurdity of the postponement of any dividends with a view of misleading her is too apparent for argument, and this is emphasized by the fact that such postponement would involve an undestanding with the owners of the remaining fifteen-sixteenths of the Hercules property, who were all doubless just as interested in receiving dividends as the appellant, none of which owners excepting the appellee Eugene R. Day she even pretended ever approached her at any time upon the question of the purchase of her interest. Therefore, we have another allegation in this amended bill that must

have been inserted therein to bolster up this pleading without any expectation of making any proofs concerning the same.

Having abandoned at the trial the averment of agency or employment existing between Allen and the appellees Eugene R. Day and Eleanor Day Boyce, any representations that Allen may have made to appellant are entirely incompetent and immaterial so far as concern those appellees and the purchase of appellant's property. Allen, in his testimony, denied these representations and frankly and fully testified as to what passed between him and his principal, the appellant.

Judge Dietrich unequivocally disposed of the fraud or conspiracy which she alleged in the following language:

> "There are charges of both actual and constructive fraud. As to the former, in substance the plaintiff's claim is that the defendant Allen, instigated by, and in collusion with Day, made false representations to the plaintiff as to the condition of the property and its future prospects, for the purpose of alarming her and inducing her to make a hasty and improvident sale, and that, because of her friendship for and confidence in him, she believed him, and was thus fraudulently induced to sell at a grossly inadequate price. In bringing about the sale, Allen undoubtedly acted as the plaintiff's agent, and the few circumstances which upon their face were perhaps sufficient to warrant suspicion of collusion are satisfactorily explained. Allen was not in the employ of Day or his sister, nor did he act in concert with or at their suggestion I am convinced that he endeavored to get as high a price as possible. True, he suggested certain considerations to the plaintiff which it may be assumed were intended to put her in a frame of mind to give serious thought to Day's

offer, but such is the practice of real estate brokers who are trying to bring together the owner and prospective purchaser. He made no misrepresentations of facts, and laid before or discussed with her only possibilities which furnished legitimate subjects for consideration. Moreover, I am satisfied that at no time did the plaintiff entertain the view that he was representing Day's interests rather than her's. To say the least, the earlier conferences between them are entirely consistent with the theory that she regarded him as her agent, and later, before the sale was consummated, she so designated and empowered him by a formal written instrument. True, at the bank, when the escrow was being deposited, upon the question of Allen's compensation being raised, she seems to have made the suggestion that he was working for the Days. But I am inclined to think that the remark is more significant of thrift than of candor, and was not very seriously intended. Certain it is that she did not press the point, but, without objection or protest, aside from the single suggestion, she promptly turned over to Allen a check which she held, for $5,000.00, the amount mutually agreed upon. Their relations continued to be friendly, and Allen continued to act as her agent in looking after her property interests in Shoshone County. In respect to all other matters, as appears from the letters in evidence, he seems to have been painstaking and to have protected her with the most scrupulous care. His apparent candor and directness as a witness left no doubt in my mind of his good faith, and besides, to take the plaintiff's view is necessarily to accept the wholly improbable theory that not only Day and Allen, but the latter's aged father-in-law, a state district judge, with

whose family the plaintiff had long been upon terms of intimate friendship, and his wife, had entered into a conspiracy to defraud her. I have no hesitation in dismissing this charge." (Record page 1374).

One reference, however, to the alleged representations of her agent Allen which illustrates the cunning and craftiness of the appellant and a compelling motive for her urging the sale of her property upon the appellee Day, is not deemed to be out of place in this connection at this time. She alleged that he represented to her that people in Spain claiming under a will made there by her late husband, Damian Cardoner, were likely to cause her trouble and might come to this country and get her interest in the mine away from her unless she converted it into cash which they could not reach. This allegation alone would fall of its own weight without any denial, as there is no accompanying fact or circumstance indicating that Allen could possibly have any information as to the people in Spain, or their interest in her deceased husband's estate, or their likelihood to make her trouble concerning the same. She alone would be the most likely to possess this information; she, who had been the recipient of the benefits derived from the contesting and cancellation of her late husband's will. However, Allen testified as follows:

"Q. Did you suggest to her that people in Spain claiming under a will there made by her late husband, were likely to cause her trouble, or might come to this country and get her interest in the mine away from her?

"A. Those are her own words, I never knew anything about that." (Record page 614).

Referring to this feature of her case, Judge Dietrich said:

"Besides—and I think this consideration had much weight with her, regardless of its merit or want of merit in point of law—she was not without fear that the legatees named in her husband's will would seek to assert rights thereunder, and she reasoned that such a contingency was much less likely to happen or to turn out adversely to her if she disposed of all her interest in the specific property of the estate." (Record page 1395).

The alleged relationship of agent and principal between Allen and Eugene R. Day and his sister being eliminated from the case we come to the allegation in the amended bill wherein appellant avers that in consequence of the representations and statements made to her by Allen she believed that she must speedily dispose of her interests in the Hercules property, and thereupon told him to sell them. This allegation entirely eliminates Eugene R. Day and Mrs. Boyce as factors in inducing her to sell. She and her agent, Allen, had thoroughly canvassed the situation. She had imparted to her agent her wish to sell and the controlling reasons therefor. He had skillfully and with great acumen conducted the negotiations that culminated in the transfer of her property which resulted in her obtaining therefor unquestionably the full value and doubtless a greater consideration than she would have received from any other person.

It is further alleged in the amended bill that the reason appellee Eugene R. Day gave to appellant a check for $45,000 drawn on one bank and a check for $5,000 drawn on another for the $50,000 payment, and that Allen received the $5,000 check at the bank as his commission, was a part of a scheme to make it appear that Allen was her representative in the transaction. There was no more excuse for this allegation than

there was for the one that Allen was the agent of Eugene R Day and his sister, Mrs. Boyce, and of course, the appellant was unable to make any proofs in support of such allegation. Mr. Allen testified that when the matter of his commission was mentioned at the time of the depositing of the deed in escrow, with the Old National Bank at Spokane, he and Mrs. Cardoner asked Mr. Vincent, the Vice President of the bank, what he thought the amount of the commission should be and Mr. Vincent figured it out something over $15,000, the regular commission; whereupon, Allen told Mrs. Cardoner he did not want to charge that much, that he thought it was exorbitant, and if she was satisfied he would take $5,000; she then asked him if he would take the $5,000 check that had been paid to her the night before by Mr. Day, which was accepted. (Record page 627.)

Mr. Day very frankly explained the reason for issuing the checks in the denominations he did. On the 28th day of October, 1916, when he drew these checks he did not have sufficient funds in the Wallace Bank & Trust Company to make the $50,000 payment and that was the reason for drawing the other check on the Exchange National Bank for $5,000, his bank balances on that date being as follows: $48,797.07 in the Wallace Bank & Trust Company, $8,842 in the Exchange National Bank of Spokane, and $211.44 in the Fidelity National Bank of Spokane, and those were the only bank accounts he had at that time. (Record pages 745 to 749).

Before passing to further averments of this remarkable amended bill of complaint, it does not seem amiss to direct attention to an item of appellant's testimony which illustrates her keenness as a witness and where she apparently got away from her counsel, in explaining the circumstances of her signing the

deed. It doubtless dawned upon her that she could probably strengthen her case by elaborating her testimony with the expression, "He made me sign it," and when testimony was offered to disprove any compulsion and that she acted voluntarily, her counsel disclaimed any reliance upon this part of her evidence. The Court in denying the admission of any testimony contradicting her statement, "He made me sign it," stated:

> "Counsel disclaims relying on that. I don't understand that there was any compulsion and the record will be so construed." (Record page 626).

No attempt was made at the trial to prove the allegation in the amended bill of complaint to the effect that the representations and statements made by Allen which induced appellant to make the conveyance were incited and suggested by appellee Eugene R. Day for the purpose of deceiving and alarming appellant and causing her to dispose of her interests in the mine at an inadequate price, and no excuse was made and no testimony offered to show any possible justification for that false charge against Mr. Day.

It is next alleged in the amended bill that at the time of the transaction resulting in the conveyance and for several years prior thereto, the Hercules properties were of the reasonable value of thirty million dollars. There is a total absence of proof in support of such allegation, and again the inquiry becomes pertinent,—What possible reason could there have been for the same, unless to make sensational reading and to place her meritless suit and amended bill of complaint, in the first instance, beyond the reach of any demurrer or motion that might be leveled against its sufficiency.

It is also alleged in the amended bill that the appellee Eugene R. Day never at any time made any disclosure or statement to appellant of any matters and things pertaining to the value of the property of the Hercules Mining Company, or of the Hercules mine, or the probable future value thereof, or any disclosure or explanation tending to disclose to her the value of her property rights in the Hercules mine and the assets of the Hercules Mining Company.

There was introduced on her direct examination six monthly statements furnished by the Hercules Mining Company, four for the latter part of the year 1915, and the January and February statements of 1916. She testified, as stated by Judge Dietrich, that she went to Wallace two days after arriving in Spokane, "To see Mr. Day and ask him for the statements. Since Mr. Cardoner died he never sent us any more statements, and I went up to ask for the statements."

It further appeared in the testimony that she received all the monthly statements for the year 1916 up to and including the month of September. These monthly statements show the receipts and disbursements of the Hercules Mining Company and also contain a trial balance of the company's business. They disclose the cash on hand, the ore sales and receipts, the property purchased and owned by the company and what it had cost up to date and the total amount of the dividends that had been paid since the operation of the Hercules mine as a commercial proposition extending over a period of at least sixteen years.

In the trial balance in the September 1916 statement, will be found ore sales, both crude and concentrates, the money received from ore sales, the total dividends paid, real estate account, timber land account, mining stock account, Northport

smelter account, Pennsylvania refinery account, and other items giving accurate, detailed and specific information as to the monthly earnings of the mine, the total disbursements in dividends, the property owned by the partnership and the sums of money spent in behalf of each of these property items.

Mr. Day testified how again and again, during the summer and up to the time of turning over to her, on the 14th day of October, 1916, the property of her husband's estate, he explained and described to her in detail all about the condition of the Hercules mine and the properties of the Hercules Mining Company and the reasons for purchasing mining claims and the stock of mining companies and the stock of the Northport Smelter and the Pennsylvania Refinery, so that up to within a week of the time he was approached by her agent upon the proposition of purchasing appellant's interest, she was in possession of what knowledge or information he possessed relative to these properties and to the future prospects of the same.

It is further alleged in the amended bill that appellant could not ascertain without an inspection of the mine and the books of the partnership what the value of the mine was or its profits or the amount of money on hand at the time of the conveyance.

Notwithstanding this allegation the appellant, acting through her counsel, when the tender was made in open court to allow appellant, her counsel, or any one they might send, to investigate all the books of the Hercules Mining Company and to make a physical examination of the Hercules mine, refused to accept such tender and to make such investigation and examination, and her counsel strenuously argued against such a tender and insisted on the appellee Eugene R. Day, by answers

to interrogatories, furnishing information relative to the business and property of the Hercules Mining Company and the physical condition of the Hercules mine.

This feature of appellant's suit presents a novel situation for which it is believed there will not be found a parallel in the reported cases. In the amended bill of complaint Mr. Day is charged with fraud and conspiracy, (concerning which charges there was a total absence of proof at the trial), nevertheless Mrs. Cardoner, speaking through her counsel, was unwilling, on her own behalf, to have a physical examination of the mine made or an investigation of the books of the company conducted; but, on the contrary, insisted that Day furnish the desired information for use in the preparation of her cause for trial, thus giving assurance of her entire reliance upon and confidence in the honesty and integrity of Mr. Day. She was entirely justified in placing reliance upon his integrity in this particular and he as conscienciously and truthfully furnished the desired information as he had in the past imparted to her what information and knowledge he possessed relative to the properties of the Hercules Mining Company, the condition of the Hercules mine, the developments that were progressing therein and the possibilities of its future. Appellant and her counsel having in such a marked degree shown their confidence in Mr. Day, it is not at all strange that the Lower Court, as indicated by the Court's decision, should have been impressed with his veracity and the good faith of his conduct throughout the entire transaction that resulted in appellant's conveyance.

Other extravagant allegations in this amended bill might be referred to but the foregoing are sufficiently illustrative of the fact that appellant never did have a cause of action in this

suit; that the false allegations contained in the amended bill were without justification or foundation and that to grant appellant the relief sought in her suit would have been a gross miscarriage of justice.

APPELLANT'S ABILITY TO TRANSACT BUSINESS.

It is only necessary to refer to one clever business transaction on the part of appellant to entirely dispose of and dissipate all her pretense of unfamiliarity with business affairs and inability to analyze and comprehend the monthly statements furnished to her husband in his life time and to her, subsequent to his death, up to the month of October, 1916. While yet in Spain she had written to Mr. Day requesting certain information, one subject involving the amount of money which he, as administrator, had advanced to her daughter Bertha pursuant to an order of the Probate Court. In his letter of March 22, 1916, (Record page 506) he advised her that the amount he had advanced to Bertha was $14,598.15. Since she left Spain before this letter reached its destination, he gave to her a copy thereof some time in April, 1916. At the time of the settling of the estate and the turning over of the property to her in October, 1916, in the statement which Day gave to her, enumerating the receipts and disbursements during his administration, this item of money advanced to the daughter appeared as $14,630.80. In going over this statement Mrs. Cardoner discovered the discrepancy between the sum mentioned in the letter and that appearing in the state ment, and called the attention of her agent Allen to the same, who, upon investigation, found that the difference of $32.65

between the amount charged on the statement and the amount appearing in the letter represented the cost of sending this money to the daughter by telegraph from Wallace to New York. (Record page 597).

GOOD FAITH OF PARTIES.

It was never pretended for a moment that Mr. Day ever made any misrepresentation to Mrs. Cardoner as to the property she conveyed or as to the Hercules mine, its past history, or its future prospects, or ever deceived her as to the property interests of the Hercules Mining Company, or ever made any misrepresentations to her at any time. If she ever became alarmed about the value or future earnings of her property it must have been as a result of her conversations with her agent Allen and Judge and Mrs. Woods. If she therefrom reached the conclusion that the mine was well-nigh worked out and the question of the value was doubtful, what is to be thought or said about the good faith of her conduct in hurrying her agent Allen to Eugene R. Day with the offer to sell and the threat that unless he did purchase her interest she would dispose of the same to the American Smelting & Refining Company, commonly known as the smelting trust, a corporation controlled by the Guggenheims, whom, she testified, Allen told her would "smash the Days," and as to the propriety and equity of her action in accepting $312,500.00 in cash for her interest in the property on the basis of a five million dollar valuation for the whole, which she believed to be practically valueless. It needs no stretch of imagination to arrive at the cunning mental pro-

cesses of her mind that evolved the suggestion that Day would be placed in a more receptive frame of mind as a purchaser if he could be impressed with the belief that the American Smelting & Refining Company and the Guggenheims were likely to become his co-partners, and when we add to this clever piece of reasoning the other fact that she wished to sell on account of trouble that might be caused her by persons in Spain who had been made legatees or devisees in her husband's will and thereby pass on to another the defense of any proceeding that might be instituted by them to recover possession of the property that had come to her through the decree of distribution, no Chancellor sitting in a court of equity should be oppressed with the feeling that appellant had been overreached or that in any business transaction she was not abundantly capable of protecting her own interests.

Commenting upon this phase of her case the Lower Court said:

> "By her testimony she gives the impression that Allen and Judge Woods and his wife made misrepresentations from which it would follow that the property, if not practically worked out, had only a speculative value, and yet for such a property Day, its manager, was admittedly making an offer based upon a value of $5,000,000.00, a price in excess of anything ever paid or offered for any interest in the mine before. If, as apparently she would now have us believe, she became panic stricken and by Allen and her other friends was induced to believe the property was practically worthless, did she think that in receiving at the rate of $5,000,000.00 from Day, she was overreaching or getting the best of him?" (Record page 1391).

FINDINGS.

The Lower Court found against the appellant upon every material and controverted issue. These findings, based upon uncontradicted facts and testimony that greatly preponderated in favor of the appellees, are determinative of the rights of the parties and fully support the decree dismissing the appellant's bill. Hence, the decree of the lower court should be affirmed upon settled principles and by reason of the oft-repeated rule of decision announced by this Honorable Court as recently as February, 1918, in Butte & Superior Copper Co. v. Clark-Montana Realty Co., 248 Fed. 609, on page 616 as follows:

> "Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

In the application of this rule the Supreme Court of the United States in Adamson v. Gilliland, 242 U. S. 350, on page 353, had this to say:

> "That so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' Davis v. Schwartz, 155 U. S. 631, 636."

RELATIONSHIP OF PARTIES.

Notwithstanding the fact that the appellee Eugene R. Day was the manager of the Hercules Mining Company, a mining partnership under the laws of the State of Idaho, and that ap-

pellant, subsequent to the date of the decree of distribution, on the 14th day of October, 1916, became one of the partners in such partnership, it was the contention of counsel for the appellees, Eugene R. Day and Eleanor Day Boyce, at the trial and still is, that the undisputed evidence in the case as to appellant's sending her duly authorized agent, Allen, to Day with her proposition to sell and with the threat that the property would be sold to others unless purchased by him, and as to her receipt of monthly statements of the business affairs, operations, receipts, dividend disbursements, and property interests of the Hercules Mining Company, supplemented by the further evidence of her conduct in going to different persons to ascertain the value of her property and in discussing the conditions of the partnership and the merits of the different properties owned by it, and the further fact that there was no deceit practiced or concealment proven on the part of Mr. Day, so entirely absolve him from any fiduciary relationship existing between him and the appellant as to leave them, in the negotiations pending and which resulted in the sale, in the position of vendor and vendee dealing with each other at arms' length. However, it is not at all necessary to eliminate the fiduciary relationship in order to support the findings and decree of the court by the overwhelming proofs adduced at the trial.

FIDUCIARY RELATIONSHIP.

This is not a case where the seller was absent from the location of the business activities and property interests of the partnership of which she became a member, or ignorant of the partnership business or its property holdings, or dependent alone upon the buyer for information as to the partnership

transactions or the value of the seller's interest in the partnership business; nor is it a case where the buyer concealed any information or knowledge he possessed concerning the partnership property, the past operations thereon or the future possibilities thereof; nor where any misrepresentations were made or deceit practiced by the buyer to or upon the seller; nor is it a case where the proposition to purchase was made by the buyer to the seller; nor is it a case where the subsequent development of the vein in the mine, the mining of which constituted in the first instance the basis of the partnership relation, disclosed ore reserves richer in value or greater in extent than had been proven prior to the date of sale.

On the contrary, in the case at bar the seller was in close proximity to the location of her property interests; accurately informed as to the property holdings and business affairs of the partnership; furnished with monthly detailed statements of the receipts, disbursements, sales, collections, dividend payments, cash accumulations and property holdings of the partnership; informed of the views of disinterested partners with large holdings as to the value of the property she was seeking to sell; the recipient of such information and knowledge of the partnership property, the past operations thereon and the future possibilities thereof as the buyer possessed; anxious and willing to sell and the initiator of the negotiations that resulted in the sale of her property interests for which she received the full cash value, and furthermore, the exploration and mining upon the vein subsequent to the date of the transfer, disclosed by counsel for appellant, demonstrated that the ore shoots in this vein had become poorer in values and shorter in length, one at least entirely disappearing and the remaining two merging. In the whole transaction there is not the

slightest evidence of deceit, misrepresentation, fraud or conspiracy.

Lacking all the elements and contingencies that bring a suit within the province of a court of equity, it is confidently asserted that the most diligent research has been unable to discover a decree of any court rescinding a contract or conveyance on a record so free from wrong doing and so replete in good faith on the part of a purchaser as in the case at bar.

If we assume that a fiduciary relation existed between the buyer and the seller, all that was necessary to sustain the sale was to have it appear at the trial: First, that the price paid Mrs. Cardoner approximated reasonably near to a fair and adequate consideration for the property she sold; and, second, that all the information in the possession of Eugene R. Day, acquired by him in the capacity of trustee, which was necessary to enable Mrs. Cardoner to form a sound judgment of the value of the property she sold, had been communicated by Day to her.

Brooks v. Martin, 69 U. S. 70, 85.

Patrick v. Bowman, 149 U. S. 411, 414.

The record overwhelmingly proves she at least received the full value of the property sold, and that Mr. Day, besides furnishing her with the monthly statements of the company's affairs extending over a period of more than a year and up to the first day of October, 1916, the month in which she consummated her sale, again and again, advised her about the condition of the Hercules mine, the state of the development work therein and the probabilities of its future life, the property interests of the company, the reason for the suspension of dividends growing out of the enforced shut-down, and the advantageous position the owners of the Hercules property were in by reason of their smelting and refining connections,

which enabled them to move the ore from the vein through all its different stages of treatment until it reached the market as a refined product. This information was imparted to her time and time again from the day she first called upon him in April, 1916, up to the 14th day of October of the same year, when the estate was closed and he turned over to her the property to which she was entitled under the decree of distribution. During the administration of the estate and all the years of his management of the Hercules Mining Company there was not raised a zephyr of suspicion or a breath of complaint that he had not acted with scrupulous honesty, unimpeachable integrity and intelligent care. The history of her past business transactions and life makes it impossible to believe that she would not insist upon and demand such information concerning the property she was expecting confidently to become the owner of, and there cannot be invented any reasonable excuse on the face of this record why Mr. Day should not have given to her this information and knowledge which he possessed the same as he would to all other owners in the Hercules mine. It is impossible to couple his intelligent and honest management of this property and the confidence in him thereby inspired in the owners thereof, with a suggestion that he held back anything from her. Furthermore, as he testified, it had been made to appear to him that the property which he was administering upon was to be held eventually in equal portions by Mrs. Cardoner and her daughter Bertha, who were to remain partners in the Hercules Mining Company, as the husband and father had been a partner in his life time. He could therefore have no reason or personal motive for with-holding such information as he possessed.

There were no changes or new developments made, or ad-

ditional ore shoots disclosed, and nothing whatever done that enhanced the value of the property sold, between the time of Day's last conversation with the appellant and the day of the consummation of the sale. As a matter of fact it was brought out at the trial over the objection of counsel for appellees that the exploration work carried on in the Hercules mine subsequent to the 28th day of October, 1916, when the sale was made, disclosed that of the three known ore shoots developed on the Hummingbird tunnel level, the far eastern one discontinued and did not go down to the 400-foot level below the Hummingbird tunnel; that on the 600-foot level below the Hummingbird tunnel, the west ore shoot was 100 feet shorter than on the tunnel level, and that the indications were that the middle ore shoot would merge into the western one leaving one ore shoot instead of three below the Hummingbird tunnel level, of a length of 500 feet instead of the aggregate length of 975 feet, (Record page 929) and that the ore became baser and the silver values lower therein on the levels below the Hummingbird tunnel level, and that where the vein for a height of 50 feet above the No. 5 tunnel would produce 60,000 tons (Record page 916), on the 800 foot level below No. 5 tunnel it would produce only 33,333 tons (Record page 925).

ASSIGNMENT OF ERRORS.

The first error complained of by appellant was the introduction in evidence of the option given by the members of the Hercules Mining Company to J. P. Graves for the purchase of their property interests for a consideration of $6,000,000, in 1906, and at a time when the mine was ten years younger in period of production than at the time of the sale by

Mrs. Cardoner. This was entirely legitimate testimony showing the value which the owners of the property, then placed upon it, and at a time when the mine had not been depleted of the ore reserves extracted therefrom during the subsequent period of operation. The Court treated it as an offer of sale, as an indication of the value which the owners placed upon the property.

Assignment No. 2 is to the effect that during negotiations for the sale of the property appellee Eugene R. Day communicated no information to the appellant with reference to the property, and that she did not at the time of the sale possess information necessary to enable her to form a sound judgment as to the value of the same. In this connection, it will be found that the record contains abundant proof that Day did give her what information and knowledge he possessed relative to the mine, its physical conditions and its future possibilities; also told her all about the assets of the company, its stock ownership and ore in transit to the smelters. Furthermore, she had the reports, as hereinbefore referred to, covering the history of the mine up to the 1st day of October, 1916; that his conversations with her extended over a period from April, 1916, up to and including the 14th day of October of the same year and to within a period of less than a week of the time that her agent, Allen, initiated the negotiations for the sale of the property. It is impossible to conceive of a case where a partner in a mining venture could have had more specific and detailed information than that possessed by the appellant, or where a mine manager could have done more or said more to advise his principal as to the condition, value and outlook of such principal's property. As a matter of fact, the information he imparted to her was an over estimate of what

subsequent developments proved that the mine was worth or contained in ore deposits. Counsel for appellant insisted in his cross examination of Mr. Day in ascertaining what the subsequent mining operations disclosed. The uncontradicted evidence thereby brought out sustains the above suggestion that the information Mrs. Cardoner received from Day was altogether too encouraging. Instead of the continuation of the three ore shoots existing on the Hummingbird tunnel level, where the mining operations were proceeding at the time of the sale, later developments proved that one of these ore chutes did not go down to the 400 level below such tunnel; that the main shoot had shortened 100 feet, and that the west and middle shoots were merging, and furthermore, that the ore was becoming baser with a smaller silver content.

In assignment of error No. 3, it is complained that the price paid did not approximate reasonably near a fair, adequate consideration. Again, the record conclusively proves that there is no excuse for such complaint, but as a matter of fact appellant received more than a reasonably fair or adequate consideration and more than her property interest was actually worth.

The argument and conclusions of the learned counsel appearing in the brief of the appellant are based upon erroneous premises not applicable to the facts in the case at bar, and are founded upon assumptions and hypotheses and not upon the testimony adduced at the trial.

Let us illustrate: It is contended that Eugene R. Day did not advise Mrs. Cardoner in any of the numerous conversations he had with her relative to the Hercules Mine and the properties of the Hercules Mining Company, between the 19th day of April, 1916, and the 14th day of October, 1916,

inclusive, as to the net income from the operations of the Hercules Mining Company extending over a period of sixteen years.

For about six years prior to the date of her sale Day was the mine manager and not an accountant or expert bookkeeper. While it is true that he had access as such manager and as a partner to the books and records of the Hercules Mining Company, his access thereto was not exclusive, nor any freer than that which was enjoyed by all the partners, including the deceased husband of the appellant and the appellant during the time she was a partner as well as during the time that the estate of her husband was being administered upon.

On page 734 of the Record will be found the testimony of Mr. Day upon this matter:

> "Q. Mr. Day, was there any conversation with reference to your offer to Mrs. Cardoner with reference to going to the mine and the office of the company, or having anybody go there in her behalf?
>
> "A. Why, as I said previously, Mr. Beale, I had offered her my automobile. It was at her service or at any one's service that she would wish to take with her to inspect the whole property, both the mill and the mine and the whole place, our books, the Hercules books, are always open to all of the stockholders, the partnership, during office hours, and always have been. Many times Mr. Paulsen comes and looks over the books. They are always open to the partnership."

Upon this undisputed question Judge Deitrich had this to say:

"It is not a case where the principal is at distance and wholly dependent upon the information furnished him by his agent or associate, or is a stranger with no one to whom to turn for assistance or advice. The company's mill was within a few moments' walk from the office at Wallace, and the mine a few moments' ride upon the train or by automobile. They were at all times accessible and open to the plaintiff; and so were the books and records of the company. Of this there is no question." (Record page 1388.)

When he urged her to inspect the mine and the books and records of the Company, or to have anyone she might choose, to inspect and examine the same, she refused. Furthermore, as hereinbefore pointed out, when the tender was made in open court to have anyone that appellant or her counsel might select, go and investigate the books of the Hercules Mining Company and to expert the Hercules Mine, the tender was rejected, and her counsel insisted in open court that such investigation of the books and examination of the mine should be made by the appellee Eugene R. Day for the use of appellant at the trial. (Record pages 763-764.)

Mr. Day, not being an accountant or expert bookkeeper and not being in possession of all the information called for in the interrogatories, was forced to hire expert accountants to compile such information from the company's records, and the expense of such compilation that he was required to make was taxed by the lower court as part of the costs against the appellant. It was no part of his duties as manager for Day to be in possession of knowledge or information as to the past operations, of the Hercules Mining Company, and as to the cost of the exploration and mining of the vein in the

Hercules Mine, extending over its sixteen year period of commercial life.

And the decisions of the Supreme Court of the United States imposed no such duty upon him, nor did they require that he should have hired others to compile such information from the records of the Mining Company, particularly during a period of ten years in which he had nothing whatever to do with making such records, before he could negotiate for the purchase of the appellant's 1-16 interest in the Hercules Mine and the properties of the Hercules Mining Company. And this is especially true when it is remembered that these records were, at all times, subsequent to the death of her husband, as accessible to the appellant, or to anyone she might choose to send to investigate them, as they were to Day.

In the discharge of his duties as manager he was required to look forward and not backward. He was not employed to spend his time familiarizing himself with the records of the company. He was expected to use his energies and abilities as a practical miner to extend as long as possible the life of the mine. He was not paid to explore the abandoned stopes but to develop new ore bodies for future stoping. Had he spent the money of the company in attempting to secure the knowledge and information it is claimed he should have furnished Mrs. Cardoner before entertaining her forced proposition to purchase her interest, he would have been discharged and properly so.

It is unreasonable to suggest and absurd to contend that Day should have gone through all the records of the Hercules Mining Company, extending over a period of 16 years' operations, to disclose to Mrs. Cardoner a tabulated mass of figures such as is found on page 102 of appellant's brief. *He did not*

have the information in his possession, and he never acquired the information as manager, to enable him to furnish such figures to appellant, and he could not from his knowledge, supply the data from which such figures were made. In fact it took weeks of effort and labor by most skillful and learned accountants to assemble the facts for the answers to the interrogatories and upon which some other accountant must have spent much time and effort in tabulating such figures. Mrs. Cardoner, or any one she might designate, had as free access to the records of the Hercules Mining Company, as Day had, and he was not required to hire men especially fitted for such work to compile data she refused to have compiled for herself. The situation would have been different if he had denied her access to the books, the mill or the mine.

It is believed no decision can be found in which there has been decreed a rescission of sale, where there was not exhibited in the case a wilful misrepresentation of the conditions, or a deliberate concealment of facts exclusively within the knowledge of the trustee. Hence, the authorities and texts cited in appellant's brief are wholly inapplicable to the case at bar. The pivotal point in such cases being an intentional false representation, or a knowing concealment of material facts within the possession of the purchaser.

An analysis of one decision of the Supreme Court of the United States will suffice to support the above assertion. In Brooks v. Martin supra; on page 84, the Court adopted the following language of Lord Chancellor Eldon, to-wit:

> "A trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances; provided the cestui que trust

intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee."

Thus it will be seen that the information to be imparted is "information acquired by him in the character of trustee," and not information or knowledge secured in some other manner than that acquired while acting in the fiduciary relation, and it was upon that holding that the Supreme Court of the United States based its ruling for the future guidance of Federal Courts, to-wit:

"We lay down, then, as applicable to the case before us, and to all others of like character, that in order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter."

It is important to note that the Court was explicit in this statement of the doctrine promulgated for the future government of the courts that the rule applied only to cases with facts similar to those in Brooks v. Martin. A mere glance at the facts in that case will show that the rule is not applicable to this case. The material facts are not only unlike, but entirely opposite. The only point of similarity is there were two partners in both cases and one of them was the acting managing partner. In all other features, the cases are dissimilar.

(a) In that case the plaintiff was absent from the place

where the business of the partnership was conducted. In this case the plaintiff was in the immediate vicinity of the business office of the partnership, and of the mill and mine.

(b) In that case the partner repeatedly requested a statement of the affairs of the partnership business, but did not secure any. In this case the partner was furnished with monthly statements up to the time of her sale.

(c) In that case the managing partner concealed matters from his co-partner. In this case there was no concealment.

(d) In that case the purchasing partner proposed the purchase. In this case the selling partner urged the buying partner to buy, and suggested reasons for the sale that she thought would put the purchaser in a receptive mood to accept her offer of sale.

(e) In that case the seller was wholly dependent upon the buyer for information as to values and conditions of the property sold. In this case the seller did not rely upon the information received from the purchaser, but consulted others, not in any manner interested in the sale, as to the value, present conditions and future possibilities of the property she sought to sell.

(f) In that case there was a concealment by purchaser of material facts. In this case the buyer gave to seller all the information in his possession to enable her to form her judgment as to the value and the condition of the property she subsequently sold.

While many decisions are available but one additional case will be cited, showing that the holdings of the courts have been that it was information *secured by the trustee during his employment as such* that he should not take advantage of

without imparting the same to his cestui que trust. It is the language of the Supreme Court of Iowa in Buell vs. Buchingham & Co., 16 Iowa, 284, found on page 287:

> "But when it is clear that the cestui que trust intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee, of information acquired by him as such, the purchase will be upheld and enforced."

Wherein has Day failed to comply with such ruling?

The language of Perry on Trusts, Section 195, page 318, quoted in part near top of page 56 of appellant's brief, is in harmony with the above ruling both of the Federal and State Courts, and in support of such language the author cites the Iowa and other cases. Reference to this section will show that the writer of appellant's brief broke into the middle of the sentence and inadvertently left out the introductory part. The quotation should read as follows:

> "But there are exceptions to the rule, and a trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the cestui que trust intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee."

It was both a physical and mental impossibility for Day to carry in his mind the company's records so as to impart the same to appellant, and the fact that he was forced to hire men especially equipped by education and training to assemble the

information before he could answer the interrogatories, is a conclusive refutation of the argument that he should have been able to give Mrs. Cardoner the results of such investigation, when the records were as accessible to her accountants as to his.

It was never contended at the trial that the defendant Eugene R. Day misrepresented any fact to Mrs. Cardoner. It is difficult to conceive of a case where the conduct of a managing partner was freer from fraud, concealment or misrepresentation than in the case at bar. Time and time again during the spring and summer of 1916, Day went over with the appellant, the matter of the business of the Hercules Mining Company, its property interests, the condition of the Hercules Mine and its future possibilities, and inasmuch as it is erroneously contended that his testimony does not show that he imparted all the information he had acquired, we ask the indulgence of the court in the extensive quotation of his testimony upon this matter, giving both questions and answers:

"Q. Where did you see her?

"A. At my office in Wallace, Idaho.

"Q. Where was your office at that time?

"A. I had two adjoining rooms, and it was room 19, in my private office, at the Wallace Bank & Trust Building.

'Q'. Did she come to your office or telephone you before coming, or did she come to your office?

"A. Well, I won't say exactly. Sometimes she telephoned, and sometimes she came without telephoning.

"Q. In April you think was the first time?

"A. I think that was the time.

"Q. Did any conversation take place between you

at that time?

"A. Yes.

"Q. About how long was she present in your office, if you can recall?

"A. Well, Mr. Beale, her calls and visits to the office were often, and they were long. I can't say exactly how long she remained.

"Q. Will you kindly tell the court as best you can recollect the conversation that took place between Mrs. Cardoner and yourself on that first call in April, 1916?

"A. Well, after the usual greeting which took place between us, she proceeded to tell me about her trouble with her son-in-law Mr. Bouchet. She said that Mr. Bouchet had deposited her money and daughter's money together, and that she did not want it that way. She thought the money should be separated, and each keep their private account. He refused to do it, and she asked him why, and he said, "Suppose, mama, you die; there will be lots of trouble if you have it in your own account; I have deposited this together, and that is the reason I have done it, that there would be less trouble," he remarked to her, so she told me, if it was deposited in that way.

"Q. Did she say where he deposited it, in what country, or how?

"A. I understood it was in Barcelona.

"Q. Kindly go on and tell us—

"A. Well, she said they had considerable trouble, and one word led to another, after things got pretty warm, and he, up to this time, had insisted that she live with himself and her daughter, and she did not want to

do it. Finally, in the discussion, she said he threw a lot of papers in her face, and she left. She was not on good terms with him now, she said and neither was she on good terms with her daughter, for she said Mr. Bouchet was influencing Bertha wrong, and Bertha herself was all right, but she was under his influence.

"Q. Well, go on.

"A. She notified me at that time that by an arrangement with Bertha and herself, that she was going to come into all of the property of her husband in this country. She said she did not want any papers, anything, statements, or any letters sent to Bertha or Bouchet in Barcelona, and asked me to deliver any papers and all papers to herself here. There had been, since Mr. Cardoner's death, an accumulation of papers and statements in the office.

"Q. What statements were those, Mr. Day?

"A. Those were statements made by the Hercules Mining Company.

"Q. Monthly or weekly?

"A. The Hercules Mining Company from its infancy has furnished each and every owner a trial balance of its books monthly, and a statement of the current expenses. These statements are given to each member. But after his death those accumulated in the office, and were in the office at that time. She wanted them, and I got the statements and gave them to her. After getting the statements she went away, and some little time afterwards she told me she was short certain statements. I don't remember now what statements they were.

"Q. That was at a subsequent conversation?

"A. That was at a subsequent conversation.

"Q. While we are on this line of evidence, these statements, let us clean it up.

"A. So she told me she was short. I in turn notified Mr. Hoover, who is the chief accountant for the Hercules Mining Company in Burke, about these statements, and requested that he give me those statements, so that I could give them to her. He did, and when I met her in Wallace I gave them to her. At different intervals she was probably in my office a dozen times that summer. And at different intervals, whenever there was any statements that would come to me as administrator, I turned them over to Mrs. Cardoner.

"Q. Do you remember the last statement or statements that you turned over to her?

"A. I think the last statement that I gave Mrs. Cardoner was the September statement.

"Q. What year?

"A. 1916.

"Q. Do you recollect when you gave her that September statement?

"A. Well, I think it was the time that we finally—we finished up the administration of her husbands affairs.

"Q. When you turned over the property to her?

"A. I turned over everything to her, everything I had.

"Q. I think that has been testified to somewhere along about the 14th of October, as I remember.

"A. I won't say the exact date.

"Q. What have you to say as to whether or not the statements for the year 1916, commencing with January

and for each month including September, were delivered by you to Mrs. Cardoner?

"A. They were all delivered by me to Mrs. Cardoner.

"Q. Now, if you will kindly go back to the time in April, 1916, when you had your first conversation, when you and she had your first conversation, will you tell the court if any conversation took place relative to the Hercules property or properties?

"A. Yes. There was a conversation at that time, the very first meeting.

"Q. Well?

"A. She wanted to know what about the property. I sat in my inner office and told her the details of the property as nearly as I was able to. I commenced with the mill in Wallace, told her all about the new mill in Wallace—we call it the new mill—it is seven years old, but we had another mill on the hill which burned, and therefore we called this the new mill.

"Q. Did she have any acquaintance with the old mill on the hill?

"A. Oh yes, of course she did.

"Q. All right.

"A. And after telling her about the new mill, I told her that my machine was available for her and anyone that she would wish to take with her, to tell her about the mill or the property, and invited her to go and see it, and she said she might at some time, but at that time it was too cold, and she declined.

"Q. Was anything else said about the condition of the mine at Burke?

"A. I told her that there had been many changes at the Hercules properties since she lived in Burke, that the upper levels of the mine were worked out, that exit to the ore body was gained through a long tunnel, known as the Hummingbird tunnel, by some, and by the Hercules people as No. 5; that this tunnel and property had been acquired very largely from her husband, who was a large stockholder.

"Q. A large stockholder in what?

"A. In the Hummingbird property. That upon this Hummingbird ground there stood many houses. It was necessary for the Hercules Company to buy these houses, so that we could have sufficient room to operate the property, and that those houses had been torn down, and machine shops, blacksmith shops, compressor rooms, and all those necessary buildings for a mine were now occupying that ground.

"Q. On what ground?

"A. It was ground purchased from the Hummingbird, and there had been settlers settled upon that patch of ground. It was the property of the company, and it was better to pay those settlers and get them off amicably than to start lawsuits to eject them.

"Q. When you speak about purchasing the ground, did you have reference to buying the stock or buying the ground from the company?

"A. We bought the stock, that gave us possession of the ground.

"Q. And you have made returns of the ownership of the Hummingbird Mining Company's stock in your interrogatories, have you not?

"A. I think so.

"Q. Did you say some of that stock was purchased from her husband?

"A. A very large block. I can't tell you exactly how much.

"Q. Well, go on and tell us further. If you described the condition of the mines, if you did at that time, tell the court what you said.

"A. I described the condition of the mines, and I told her that it was very largely worked out from the apex to the Hummingbird level, that we were in the process of sinking a shaft at that time.

"Q. From what point?

"A. From the No. 5 level, Hummingbird level.

"Q. Yes.

"A. That the shaft had proceeded down and cut the vein on the 200, was cut, the ore intersected, but there was not sufficient work done there to tell about the ore bodies at that time, that the shaft was still being sunk.

"Q. Well, what did you tell her about the discovery of ore on the 200-foot level?

"A. I told her we had discovered good ore, but that we hadn't had time to know how good and how much we had discovered.

"Q. Well, at that time was anything said about any further property of the Hercules Mining Company, as to any stocks, or anything of that kind?

"A. She wanted to know all the property interests, because she was coming into it, and she wanted to know all about it.

"Q. Yes?

"A. I explained to her that the Hercules Company

owned many claims, a great deal of stock in outlying claims, as a protection to the Hercules, that they had very little value, but that they were a protection to the Hercules property.

"Q. Now, as to the mining stocks that the Hercules Company itself had purchased, did you describe anything about those, if there were any?

"A. Oh yes, we had purchased mine stocks and smelter stocks also. I told her we had purchased the Northport Smelting Company, a half interest in that, at a cost of forty thousand dollars. And I told her we had purchased three-eighths of the Pennsylvania Smelting Company, at a cost of $87,500.

"Q. How much of the stock in the Northport Smelter?

"A. Fifty per cent of its capitalization.

"Q. How much had it cost the company at that time?

"A. Forty thousand dollars.

"Q. That was the purchase price?

"A. That was the purchase price.

"Q. How much of an interest in the Pennsylvania Refinery?

"A. A three-eighths of its stock.

"Q. And it cost how much?

"A. $87,500.

"Q. Was anything about the business of the Northport Smelter or the refinery discussed at that time?

"A. It was gone into very thoroughly. I explained to Mrs. Cardoner the reason why we had gone into the Northport Smelter and the refinery—that previous to going into the smelting and refining business we had had

a very advantageous contract, that we were no longer able to have that contract renewed, and were without a contract for several months during the summer of 1915.

"Q. What was the condition of your operations during those months?

"A. The mine was shut down because we had no place to ship until we got some arrangements made.

"Q. Go on now. What were the advantages of having that stock?

"A. The advantage, I told her, of having the stock, was simply this, that I considered the business of the partnership in better condition than it ever had been before. That by having a connection with the smelter and refinery we were able to see the ore from the time it was broken in the mine through all its processes to the market; that we received and would receive all that was in it, the by-products, and that we would get in general everything that there was in the ore.

"Q. Was there anything discussed as to whether that was a good business proposition or not, if that question came up?

"A. Well, I thought, of course, it was, and I told her it was, and she said she wanted to know if it was, if I really thought it was good business. That there seemed to be so much ore in transit, and she had heard Mr. Cardoner say to keep out of the smelting business, and she wondered if it was good. And I told her that I certainly believed it was.

"Q. Was there anything said about ore in transit, to her?

"A. I explained to her that by having these proper-

ties, and by smelting this ore ourselves, it took three months or more to get returns from the ore in the market, because the smelter or the refinery did not have the capital to do for the ore as the East Helena plant, or former shipping place, had, and that of course we must sell the ore to get the money.

"Q. Did you tell her anything about how much ore was necessarily in transit unsettled for? Did any conversation of that kind occur?

"A. Well, I think I told her—I am sure I did—that there was a very large tonnage of ore in transit, and that it would probably amount to eight hundred thousand or a million dollars.

"Q. Well, what did she say as to that, as a business proposition, if anything?

"A. Well, she didn't think that it was good business to tie up so much money, and so much ore in the business, in the smelting business, and she was quite doubtful about it. But I assured her that the business of the partnership was never healthier than it was at that time.

"Q. Was there anything said about the condition of the mine, the future life of the mine below the Hummingbird tunnel?

"A. She asked me my opinion, and I told her that if we had always had good ore all the way down, that the history of the country showed that the ore became baser, but I had every reason to believe that large bodies of ore would be discovered in new development.

"Q. What development was that, Mr. Day?

"A. The development by the shaft, and below the No. 5 level of the Hercules property.

"Q. Below the No. 5 tunnel?

"A. Below the No. 5 tunnel.

"Q. Was there any statement made in reference as to how deep it might go?

"A. Yes, that was talked over.

"Q. What was it?

"A. She asked me how deep that I supposed it would go and I told her no one knew that; that the best opinion we could have would be proved by the example of others who mined in the district close to that particular place.

"Q. Did you have any other conversations with Mrs. Cardoner during the summer of 1916 at your office in Wallace?

"A. Yes, I did. Mrs. Cardoner came to my office sometimes twice between office hours. She also was in my office in the evening.

"Q. Just one question, and we will dispose of it once for all. Mrs. Cardoner said that you refused to give her—in substance, that you refused to give her any information as to the Hercules mine, or the property of the company. What have you to say to that?

"A. I gave Mrs. Cardoner all the information that I had and that was available of giving, and I have given every Hercules owner every information I have regarding that property.

"Q. She also said that you hurried her away, on the statement that you did not have time to talk to her, or in substance like that.

"A. Mrs. Cardoner's calls and visits at my office, as I have witnesses that can prove, lasted from forty-five minutes to two hours and a half.

"Q. Now, how many conversations would you say you had with her during the summer of 1916?

"A. I would say at least a dozen.

"Q. Was she interested in knowing the development?

"A. She was interested in knowing every detail concerning that business. She wanted to know every particular thing, and did know it too, as near as I could tell her.

"Q. Was there anything within your knowledge as to the condition of the Hercules mine or the properties of the Hercules Mining Company, that you concealed from Mrs. Cardoner?

"A. I gave her full information upon every subject. (Record pages 716-730.)

"Q. Her first conversation ,of the 19th of April, I think it was fixed at that, by either you or both of you, the 19th of April, 1916.

"A. We commenced to sink the shaft about the first of March, and the race that we proceeded was about a hundred feet a month.

"Q. About how far would it be down in April, 1916, at the time of the conversation?

"A. Well, it would be down close to 200 feet.

"Q. Did you explain to her the condition of it at that time?

"A. I think the condition was this, that we were sinking, and it was a little later than I indicated yesterday that we started to cut the station.

"Q. What station?

"A. On the 200-foot level.

"Q. Kindly tell the court about when it was you cut the station on the 200-foot level.

"A. Well I think it was in July.

"Q. July, 1916?

"A. Yes.

"Q. What did you do then? When you drift from the station to the vein, if you did so?

"A. As soon as the station was cut we proceeded over to the vein, and on encountering the vein drifted on the vein.

"Q. Will you tell the court whether or not you gave that information to Mrs. Cardoner?

"A. I gave her all the information I had, Mr. Beale. (Record pages 749-750.)

"Q. What information did you have relative to the development of the Hercules mine below the Hummingbird tunnel that you did not impart to Mrs. Cardoner?

"A. I gave Mrs. Cardoner a full account of all the operations that were going on.

"Q. Did you at any of these conversations conceal from Mrs. Cardoner any information relative to this development work that I have asked you about?

"A. No, I never concealed anything from Mrs. Cardoner pertaining to that business.

"Q. Did you misrepresent any facts relative to the Hercules property, the Hercules mine, or its development, to Mrs. Cardoner?

"A. No, I did not." (Record pages 752,753.)

Not relying alone upon the information secured from Day, and not disposed to follow his advice and visit the property

herself and have anyone she might designate make an examination of the mine and an investigation of the company's books, Mrs. Cardoner went to her partners Paulsen and Hutton for advice upon these vital questions, to-wit:

(a) The value of the Hercules property.

(b) The matter of the smelting business.

(c) The cause for non-payment of dividends.

(d) The condition of the development work and the ore exposed in the Hercules Mine.

(e) The necessity for building up a cash reserve fund.

(f) The large amount of ore in transit to smelters.

(g) The advisability of the sale of her interest to the Day family.

Mr. Hutton testified that in the fall of 1916, a few weeks before he learned of her sale to Mr. Day, she called upon him at his office in the Hutton Block, Spokane, Washington, at which time they had a conversation in which he told her that he considered $4,000,000.00 a good price for the Hercules property, including the Hercules Mine, the equipment, smelting and concentrators. (Record, page 672.)

Mr. Paulsen testified that in the month of October, 1916, Mrs. Cardoner called at his office in Spokane, Washington, by appointment, and that he had a conversation with her at that time during which there was discussed the matter of the advisability of the sale of her interest in the Hercules property to the Day family, the value of the Hercules Mine, the fact of non-payment of dividends for certain months by the Hercules Mining Company, the condition of the development work and the ore exposed in the Hercules Mine, the fact that the Hercules had gone into the smelting business, the necessity for building up a reserve fund to take care of additional business

propositions and the large amount of ore in transit to smelters. (Record, pages 683, 684, 685.)

Mr. Paulsen further testified that after he learned what price had been paid by Day to Mrs. Cardoner for her interest he felt she got a good price for the same, and that from his acquaintance with the property he would not have been willing to pay for her interest more than that paid by Day. (Record, pages 685, 686.)

In addition to her numerous discussions with Day and her conversations with Hutton and Paulsen, Mrs. Cardoner and her agent Allen went over the matter of sale to Day in detail. They debated from every conceivable angle the advisability of the sale, the history of the Hercules Mine, its present state of development and ore reserves, its past exhaustion and its probable length of life, the value of her interest, methods for securing the biggest possible price from Day and many of the reasons why the consideration she received was all, if not more, than the property was worth.

It is impossible to imagine a case of more painstaking accumulation of information and of more careful weighing of future possibilities and eventualities before the consummation of a sale of property of the character involved. Nothing seems to have been overlooked by her as the testimony of her agent Allen shows.

Speaking upon the subject of a transaction between a trustee and cestui que trust Mr. Kerr in his work on Fraud and Mistake on page 151 had this to say:

> "If it can be shown to the satisfaction of the court that the other party had competent and disinterested or independent advice, or that he performed the act, or entered into the transaction, voluntarily, deliberately, and

advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power of influence to which the relation gave rise, the transaction will be supported."

Notwithstanding the fact that neither good faith, fair dealing, nor the decisions of the courts imposed upon Day either as manager or partner, the duty of furnishing to Mrs. Cardoner information ascertainable from the books and records of the Hercules Mining Company as to the net income, yet, he did supply her with such information in the most concrete, lasting and easily understandable form, by causing to be delivered to her the monthly statements, referred to in the record, from which she could secure such information, and from which, it is shown by the testimony of her agent Allen, that she did have such information.

A labored attempt is made in appellant's brief to give the impression that Day concealed something from appellant when he did not specifically point out to her the item of $11,915,-986.74, the net profits from the mine up to the 28th day of October, 1916. It was impossible for him at any time prior to the date of the purchase from her to give her this exact amount, and it was not ascertainable until after the sale, when the records of the operations for the month of October, 1916, were made up. However, he did furnish to her the monthly statement for September, 1916, from which the net income for the entire sixteen years operations of the Hercules Mining Company was ascertainable as of the date of the 30th of September, 1916.

In referring to this matter Mr. Day testified as follows, page 792 of the record:

"Q. What did you tell her they aggregated, if you

told her?

"A. I don't know as I told her exactly what it aggregated. I went all over the conditions, and she had her statements, and they had down what the history of the mine had been."

How would it be humanly possible for Mr. Day as manager, or partner to furnish Mrs. Cardoner with more accurate information as to such aggregate net profits? She had her September statement from which she could ascertain the aggregate net income received up to the first of October, as readily and easily as Day could, and the records were not completed to give her the information for the first twenty-eight days of October, 1916.

Furthermore, the point was attempted to be made in appellant's brief that Day again concealed something from her, and they quote the following question and answer on cross-examination, found on page 793 of the record:

"Q. Did you tell her about the aggregate of the dividends according to that same answer, the dividends for that period of time, which had aggregated $9,981,-527.72, did you tell her the aggregate of those dividends during that time?

"A. No, I don't think I did.

This answer is entirely consistent and in no manner discloses any concealment. His answer had been to a preceding question that Mrs. Cardoner had the statements which showed what the Hercules Mining Company had done, and which contained a history of the mine. Examination of these statements will show from month to month the aggregate amount of dividends paid. Her agent Allen had no trouble in interpreting these statements and in advising her therefrom, the

aggregate amount of dividends paid and the aggregate amount of net income received, using one of the twelve or fourteen statements, which she exhibited to him, on the 21st of October, 1916, when he called upon her at Spokane, Washington. (Record pages 604-606.) He selected the March, 1916, statement, analyzed the same and therein pointed out to her the profits that the company had made, arriving at the conclusion that such profits amounted to about $11,000,000.00.

Had Allen selected the statement which Mrs. Cardoner had received for the month of September, 1916, he could have shown therefrom the net income received by the Hercules Mining Company, up to the first day of October, 1916, by adding to the amount of dividends paid, the aggregate amount invested in assets of the company ,including real estate, timber lands, mining, smelting and refining stocks, cash deposited in Wallace Bank & Trust Company, and the amount of accounts receivable, which would show a net income received of $12,-019,128.04, or he could have reached the same conclusion by adding the total amount of dividends paid to the amount of bills receivable, the investments in stocks and real estate, the cash on hand, and all other capital items appearing in the September statement, which for convenience may be classified as follows:

Dividends distributed	$10,379,527.72
Bills receivable	56,589.65
Northport Smelter	241,789.70
Pennsylvania Refinery	87,500.00
Republic Mines	46,500.00
Plant and equipment	407,956.03
Power line	26,180.39
Other investments	346,091.73

Cash on hand 426,992.82

$12,019,128.04

The fact is, the September statement, in the possession of Mrs. Cardoner, showed the net income received by the Hercules Mining Company from the beginning of its operations to be the above sum of $12,019,128.04. This sum exceeds the net income from the sale of ore extracted from the Hercules Mine during the same period, to the extent of the amounts received (before Day became manager) as dividends from the Selby Smelting & Lead Company, the profit made on the sale of said stock, and the sales of scrap iron, etc.; therefore she could not possibly have any cause of complaint that she had not been advised of the total net income received by the Hercules Mining Company from all sources.

It should be borne in mind that on the date of the sale, the amount of profits of $11,915,878.00, appearing in the profit column, page 102 of appellant's brief, compiled in part from records made up subsequent to the date of sale, was not ascertainable at the time of the sale and could not have been given to her by Day, or ascertained from the records of the company, as they then stood. The information furnished in the answers of Day to the interrogatories as to this item was not in his possession at the date of the sale, but was taken from the records of the company that were completed several months after the date of the sale, and only after returns had been received from shipments of ores in transit and unsettled for at the time Mrs. Cardoner executed her conveyance.

Again turning to the September statement, we find that the same shows that there had been received in cash from the beginning of 1916 up to the first of October:

For ore sales	$ 2,861,304.61
For interest and discount	11,755.34
Aggregating	$ 2,873,059.95
And that the operating expenses for said period of time were	1,069,052.03
Leaving as the net cash income for such period of time	$ 1,804.007.92

The difference between the last amount, or over $400,000.00 more than the $1,400,000.00, distributed in dividends, and the actual net profits, realized and accrued, is accounte l for by the difference in the amounts finally realized on the ore in transit at the beginning and end of such period, and the difference between said net cash income of $1,804,007.92, and that found in Day's answer to interrogatory No. 14 as being $2,368,682.90, compiled from subsequent records as hereinbefore pointed out, is represented in settlements for ore in transit shipped between the first day of January, 1916, and the 28th day of October of the same year, concerning which the Hercules Mining Company had no complete record, on the date of the sale, and which did not constitute a distributive net income, but an operating capital. Mrs. Cardoner was not ignorant of this condition. She had been advised by Day repeatedly that under the new arrangement, relative to the smelting of their ore, which went into effect after the shut down of 1915, there was in transit and unsettled for $800,000.00 to $1,000,000.00 worth of ore.

The record is replete with testimony to the effect that the ore in transit did not constitute a cash or distributable asset, and that for operation purposes it necessarily was and

constituted a part of the interest and property sold by Mrs. Cardoner. If it had been distributed to the partners, the business of the company would have come to an end. It is impossible to drain a stream and at the same time have a flow of the water.

It is further stated, as will be found on page 46 of appellant's brief, that Mrs. Cardoner had a right to believe that the dividends paid in 1915 and in 1916 up to the date of her sale, would approximate the earnings of the mine and that the earnings of the mine for 1915 were not more than $320,000.00 paid in dividends during that year, and that the earnings in 1916 up to the date of her sale, were not more than $1,400,000.00, the amount of dividends distributed in that period. The impossibility of her entertaining any such belief is easily established by referring to the information shown to have been possessed by her. Take for instance the figures set forth in her brief in support of the argument of her counsel and we are advised that the dividends paid by the Hercules Mining Company in 1915 were $320,000.00, that the net profit of the company for that period was $1,069,019.37, and that the net income, after deducting the dividends was $776,019.37, or, in other words, net profit of more than three times the dividends paid, and since the record nowhere shows that Mrs. Cardoner had any more information as to the dividends paid in 1915 than she had as to the net profit received by the Hercules Mining Company for the same year, there is absolutely no support or foundation for such a belief upon her part as to the dividends paid in that year approximating the net profit received.

The record, however, does show that from the statement of December, 1915, admitted to have been received by her from Day, it could be readily determined the amount of the

net income received by the company during the year 1915, which was several times in excess of the said $320,000.00 paid in dividends. It is further true that from each and every statement issued by the company for the first nine months of the year 1916, and which had been delivered to her, the net income received for that year up to the date of the issuance of each statement is readily and easily determined. Such being the case, we come to the consideration of the year 1916 up to the first of October. As hereinbefore shown, from the September, 1916, statement, the net cash income received by the Hercules Mining Company for 1916 to October 1st was $1,804,007.92, or over $400,000.00 in excess of the $1,400,000.00 distributed in dividends for that period. Supplementing this fact with the testimony that appellant had been informed by Day that there was $800,000.00 to $1,000,000.00 worth of ore in transit, under the company's new smelting arrangement, which as hereinbefore shown, when settled for represented the difference between the $1,804,007.92 and the net cash income of $2,368,682.90, found in Day's answer to interrogatory No. 14, which answer was compiled from the records only available subsequent to the date of sale, no further argument or statement is needed to demonstrate the fallacy of the claim for such a belief upon her part for the year 1916 also.

On page 47 of appellant's brief will be found the statement that the ore taken out for the months of November and December equalled 16,317.50 tons, and for the previous months in that year 70,871.61 tons, or 23% of the ore extraction in 1916, and from such figures counsel attempt to estimate a net income that would have discouraged appellant from selling her property, but we are dealing with the record and

not with supposition.

Day could not advise her as to the tonnage for November and December, 1916, for the obvious reason that at the time of the sale such tonnage was not in existence, nor could he in fact, *inform her as to tonnage for the preceding months of* 1916, without having such information compiled from the records of the Hercules Mining Company, which were just as accessible to Mrs. Cardoner as to him, and which records he had requested her to investigate herself, or to have the same investigated by any person she might designate. Even at the trial Day was not able to testify as to the tonnage for the year 1916, appearing in plaintiff's exhibit No. 53, (Record page 1319), and his examination in connection therewith was postponed until the bookkeeper could assemble the data found in such exhibit for the first nine months of 1916, from the statements, copies of which had been delivered to Mrs. Cardoner, and for the months of October, November and December, from records made subsequent to the date of the sale.

Counsel for Mrs. Cardoner, who tried her case, did not claim that Day should have furnished these figures to her, or that she was mislead thereby, or that the same made any difference whatever with reference to her fixing a price upon her interest, or her ultimate sale of the same. The monthly ore shipments in tons for 1916, up to the 1st of October, appeared in the monthly statements.

Referring to the record, as to the compilation of Exhibit No. 53, we have the following, found on pages 851, 852 and 853:

> "Q. I am told Mr. Day, by Mr. Wourms, that the data I was asking you to get for me at noon wasn't quite ready for me yet.

"A. I was so busy I did not get a chance to get it, Mr. Graves.

"Q. I understand it will be ready shortly, and therefore I will leave that subject for the present, and, if necessary, take leave to recall you.

"MR. WOURMS: I have it now, Mr. Graves.

"MR. GRAVES: May I look at it?

"MR. WOURMS: Certainly.

"MR. GRAVES: As I understand it, Mr. Wourms, this was taken from the monthly report?

"MR. WOURMS: The monthly reports, nine of which I think for that year—I have forgotten the number—are already in evidence in this court.

"MR. GRAVES: This is shipments for the year 1916?

"MR. WOURMS: Yes, that is what you—that is what I understood you.

"MR. GRAVES: That was only part of what I wanted. I thought this was for 1917. That only gives me two months of what I wanted.

"Q. For the months of November and December, as compared with previous months in the year, this shows no material change. The month of November was 200 tons less than the month of October, and the month of December was 300 odd tons more than the month of October. Are you willing to adopt those for those two months as correct, Mr. Day? This is a list of the monthly shipments, as he tells me, for the year 1916, compiled by your bookkeeper.

"A. Yes, I think they are correct.

"MR. BEALE: What do you mean by 'adopt,' Mr. Graves? That is not quite definite to me.

"MR. GRAVES: I mean is he willing to say——

"MR. BEALE: Oh, yes.

"MR. GRAVES: I in some way wanted to use this as a compilation, your honor."

Said paper was thereupon marked PLAINTIFF'S EXHIBIT No. 53.

Thus it will be seen, as suggested by Mr. Graves, counsel for Mrs. Cardoner, that there was no material change between the shipments for November and December, as compared with previous months of 1916. In fact, if we add together the shipments for April and May, 1916, we have 600 tons more shipped in April and May than in November and December.

The suggestion in the brief as to what effect the tonnage for the year 1916 might have had upon Mrs. Cardoner in the matter of the consummation of her sale, is purely imaginary and not supported by the record. No claim was made by her counsel at the trial, that the same was concealed from Mrs. Cardoner by Mr. Day. No such claim could have been made then, and no such claim is tenable now.

Let us approach this question of sale and consideration from Mr. Day's standpoint:

Mr. Burbidge testified that the present value of Mrs. Cardoner's interest, including her 1-16 of the cash and the ore in transit, was $293,405.00, (Record page 907). She received for this interest $350,000.00, and $56,595.00 more than its present worth. Mr. Burbidge's valuation was based upon the mining of the three ore shoots developed on the No. 5 tunnel of an aggregate length of 975 feet to a depth of 1950 feet, 50 feet above the No. 5 tunnel and 1900 feet below.

The uncontradicted testimony shows that of these three

ore shoots, the eastern one of a length of 150 feet on the tunnel level, cut out entirely between the 200 and 400 levels below; that the western ore shoot of a length of 600 feet on the tunnel level was only 500 feet long on the 600 level below the tunnel; that the middle ore shoot of a length of 225 feet on the tunnel level went down almost vertically; that the western ore shoot raked so strongly to the east that at some distance a little below the 600 level, the middle ore shoot will be cut off, or be merged into the western one, and that there will be but one shoot of ore , the western shoot, of about 500 feet in length.

And the uncontradicted testimony further shows that for a height of 50 feet on the vein the three ore shoots on the No. 5 tunnel would produce 60,000 tons of ore, (Record page 916), and the western ore shoot, into which there had merged the middle one, below the 600 level, would give a tonnage of only 33,333 tons. (Record page 925.)

Two pertinent questions might be asked in this connection:

First: In the face of such a record what is to become of the estimated, speculative and opinion valuation of $10,750,000.00 of the witness Greenough based upon an aggregate length of ore shoots of 1375 feet, which did not exist, and extending with such length into the earth for a depth of 1600 feet below the No. 5 tunnel, when there was no such an extension?

Secondly: Would not Mrs. Cardoner have concluded that she had made a most advantageous sale, had the facts been brought to her attention that the ore shoot below the No. 5 tunnel was only one-half as long as the aggregate length of the three ore shoots developed on such tunnel level, and that

the production of ore in the neighborhood of the 800 level below would be only about one-half of the production on the tunnel level?

From the foregoing undisputed testimony the conclusion is irresistible that the Hercules Mine did not have more than about one-half of the value upon which the sale was consummated.

Replying to that part of appellant's brief commencing on page 88 and to what is suggested to be erroneous grounds upon which Mr. Burbidge arrived at the present worth of the property sold by Mrs. Cardoner, it will be noted that the author of that brief argues from what the testimony of Mr. Burbidge ought to have been, rather than from what it was, and that such argument is not based upon the record. The lower court was concerned with what the testimony actually was and this case was decided upon the evidence offered and admitted at the trial and not upon imaginary or hypothetical testimony for the support of extravagant, speculative values.

Let the testimony of Mr. Burbidge speak for itself: (Record pages 901, 902, 903, 904, 905, 906, 907, 908, 909, 912, 916, 917, 922, 923, 924, 925, 926, 927.)

> "MR. BEALE: Doesn't that include the stocks and the assets as appear on the books of that date?
>
> "A. Yes, it includes everything that they owned, but what Mr. Graves asked me about those smelters and refinery, I considered them, of course. They are an adjunct of the mine, part of the mine. When the mine is through those plants will be useless. They will have nothing but a junk value.
>
> "MR. BEALE: I think, if your honor please, when he reads that statement, that will be clear.

"MR. GRAVES: All I was trying to do was to get his point of view.

"THE COURT: Proceed.

"A. The value of the Hercules mine depends, of course, upon the depth to which it may be profitably worked.

"MR. GRAVES: Can you state it without reading, by just referring to your notes?

"A. Well, there is a certain logical sequence in which the thing should be presented, and I have it here.

"MR. GRAVES: Have you a copy of it?

"A. Yes, I think I have (producing a copy.) In estimating that depth, we are controlled by the data available concerning other mines in its vicinity. The Tiger, its near neighbor, ceased to be profitable below a depth of 1800 feet, which corresponds to 1900 feet below Hercules No. 5 tunnel. The Standard-Mammoth ceased to be profitable at about 1650 feet and the Frisco at 1500 feet. The conclusion is therefore forced that the Hercules is not likely to be profitable at a greater depth than, say 1900 feet below No. 5 tunnel.

"There has been a fairly consistent decrease in the silver content of the ore; from 1.25 ounces to each unit of lead in the upper workings to 0.8 ounces to the unit at present. This is likely to continue, it being characteristic of the mines of the district.

"As greater depth is attained, and the workings approach the lower horizon of the Burke quartzite, the ores of the Burke district become more and more zincy —the zinc to a considerable extent displacing lead. While the zinc has some value it is much less than the

value of the lead displaced.

"These factors must all be taken into account when estimating the value of the mine.

"From the beginning of operations at the mine down to October 28, 1916, the total amount of ore mined was 1,777,591 tons. At that date there was ore remaining above No. 5 tunnel of an average depth of approximately 50 feet. The depth of the mine down to No. 5 tunnel is 2250 feet. There had therefore been worked out 2200 feet, and there remained 1950 feet to be mined down to 1900 feet below No. 5 tunnel, the estimated limit of profitable operations.

"Assuming an equal productiveness for the remaining workable ground we get

$$\frac{1,777,591}{2200} \times 1950 = 1,575,600 \text{ tons}$$

as the probable tonnage remaining in the mine as of October 28th, 1916.

"From January 1st, 1907, to October 28th, 1916, a period of 9 years and 10 months, there was mined 1,650,849 tons of ore; an average of 167,888 tons per year. At the same rate of extraction the 1,575,600 tons in the mine, as of October 28, 1916, would last say 9.4 years.

"The profit realized during the period 1907-1916 averaged $5.88 per ton, and the operating cost averaged $4.59.

"In the five years 1908-1912 inclusive, the profit per ton of ore mined averaged $3.37.

"MR. GRAVES: What was that last period you

gave?

"A. 1908 to 1912. This was a period of normal prices for both lead and silver, and labor and other operating conditions were also normal.

"It was difficult to estimate the probable profit to be realized on the ore yet to be mined, for many variable factors entered into the calculation. The period 1907-1916 included two boom periods, when the price of lead was higher than normal. On the other hand the cost of production was greater. In 1910, the first year in which operations were on present scale, the cost was $2.71 per ton of ore mined, and in 1916 it had grown to $5.25, an increase of over 90 per cent. The operation of the mine was just about to begin through the shaft; which would add 25c per ton to the cost.

"This country had not then entered the war. But it was even then a matter of general belief that after the war ends there will be a long period of business depression, which will necessarily mean low prices for lead and silver.

"Taking all these things into consideration, as well as the decreasing silver content and the increase of zinc, it was only possible to estimate the profit to be made on the remaining ore at from $2.50 to $3.00 per ton.

"Taking the estimated tonnage at the latter value we have 1,575,600 tons at $3.00, $4,726,800; adding cash on hand, $649,359. The ore in transit, $1,048,864; and accounts collectible, $29,400; total, $6,454,423. And deducting amount due to Northport smelter $278,838, leaving an estimated value of $6,175,585 for the Hercules property as of October 28, 1916.

"Q. Mr. Burbidge, how did you arrive at your estimated depth of the mine below the Hummingbird tunnel . .

"A. By assuming that it would go as deep as the neighboring mine, the Tiger.

"Q. How deep does that go?

"A. It was sunk to a depth of 2200 feet, but it was not profitably operated below—

"THE COURT: You have already answered that in your statement?

"A. Yes sir, that was in my statement.

"Q. Are you familiar with the depth of other shaft mines in that district?

"A. I mentioned three of them.

"Q. Oh, you did mention three of them? A. Yes.

"Q. What does that valuation include, the mine and what else?

"A. The cash and the ore in transit and the accounts collectible.

"Q. What disposition do you make of the investment in the Northport smelter and in the Pittsburg refinery, mining stocks and the mill and the equipment of the property?

"A. I made no disposition of them. That is, I did not take them into consideration as an asset. They had no realizable value.

"Q. Will you tell the court why, please?

"A. Because, at the end of operations of the mine, they will be valueless. Part of the machinery may be sold for ten or fifteen or twenty per cent of its cost, possibly, but that is all that can be sold.

"Q. How about the smelter?

"A. The same is true of the smelter. The Northport smelter laid idle for—oh, I don't know, ten or twelve years, and represented an investment of probably originally half a million dollars, and as testified here, it was bought for eighty thousand dollars.

"Q. What disposition or consideration did you take of those respective mining stocks you saw listed in the interrogatories?

"A. I gave them no value.

"Q. Tell the court why, please?

"A. Because there is no known value. They are purely speculative. Some of them I believe have been, you might say, the victims of over-development, what prospective value they ever had has been destroyed by the work that has been done on them.

"THE COURT: You mean they no longer even have a speculative value, is that it?

"A. Yes, sir. To begin with, there may be a speculative value in a mine or a prospect, and you do the work that you think will develop that property, but if you do not develop it you have destroyed that prospective value.

"Q. In other words, as Dr. Barrell said in the Star case, they pursued their ore to the bitter end. On that basis, Mr. Burbidge, what would you say would be the value of the 1-16th of all of those properties on the 28th of October, 1916?

"A. One-sixteenth of the total value is $385,974. The payment of this sum in dividends spread equally over a period of 9.4 years is equivalent to the payment of the whole sum at the end of 4.7 years. The present tax value

is the sum which at compound interest would amount to $385,974 in 4.7 years. On a six per cent compound interest basis it would be $293,405.

"Q. That is based upon a lump payment of the sum of the whole purchase at once, is it, Mr. Burbidge?

"A. Yes, that is discounted.

"THE COURT: I think we understand that. That is the present value?

"A. Yes, sir.

CROSS-EXAMINATION.

"Q. Now, by what kind of a process are you proposing to take the present value of that date?

"A. I am not trying to take any present value.

"Q. Then this talk about this compound interest and so on—

"A. Present value is the present value as of October 28th, of a sum payable over a certain period of years. When I say present value, I do not mean the value today.

"Q. No, I know that. But I think you do not quite get me. When you figured out and testified that the mine was worth six million, or whatever you did, on the 28th of October, you meant it was worth it in cash that day?

"A. No.

"Q. You did not mean that? Although you said it you did not mean it?

"A. I stated very clearly that it would take about 9.4 years for its realization.

"Q. So that when you said that its value was on that date, you meant that they might get that much out

of it if they worked it for nine or ten years?

"A. Mr. Graves, if I had discounted the $6,175,000 and divided by sixteen you would have had what you are seeking.

"Q. Well, can you give me that?

"A. Yes, I can give you that in about a minute.

"Q. If you would multiply the sum that you gave at the bottom here by sixteen, would that give it?

"A. Yes, the same thing. It is a question of whether you multiply or divide, it is the same thing, $4,694,480.

"Q. That is the present value of the sum of $6,175,585 distributed over nine years and something, was it?

"A. 9.4 years, yes.

"Q. Is the rest of your estimate, Mr. Burbidge—I am asking this without meaning to be offensive, as I am sure you know—is the rest of the figuring and estimating you have done there done as accurately as that part of it, do you think?

"THE COURT: You need not answer that.

"A. You have not shown any inaccuracy there yet, have you?

"Q. What lengths did they tell you that that ore body of fifty feet was?

"A. What length in feet, you mean?

"Q. Yes?

"THE COURT: This is in October, of course, 1916.

"A. Well, there were three shoots of ore, and they gave me the intimation that it was the equivalent of a depth of fifty feet in those shoots. Now, those shoots

were in the aggregate between 900 and 1000 feet long.

"Q. What depth of ore did they give you?

"A. The main stope has a width of from 12 to 15 feet; what they call the middle stope has a width of about five feet, and the east stope three and a half or four feet.

"Q. Now, Mr. Burbidge, I wish you would give me, if you can do it right easily, the tonnage of that fifty-foot depth of ore above the No. 5 level on the data they gave you. I have been trying off and on for two days to get it from somebody?

"A. Roughly about sixty thousand tons.

"Q. Did you see the stopes and the drifts below No. 5 at the 200 and at the 400?

"A. I did.

"Q. Had they worked to the east and west limits of the ore bodies in those drifts?

"A. Yes, they were working them.

"Q. I know. Had they reached the limit of the ore bodies in those drifts?

"A. They had.

"Q. What length did you find those ore bodies to be?

"A. I found a shortening of about 100 feet in the western ore shoot. That was on the 200 level.

"Q. Where else?

"A. On the 400 level the easterly shoot did not appear at all. It appears to have cut out somewhere between 200 and 400.

RE-DIRECT EXAMINATION.

"Q. You spoke about the profits in 1915 and 1916, and 1914, and said something about abnormal conditions.

Will you please explain to the court what you meant by that?

"A. Of course, I referred to the abnormal prices they—that have ruled for lead in the last two or three years. The normal price of lead over a long period, over a period of thirty years, is $4.32 1-2.

"Q. Yes, go on .

"A. In 1916 the price was $6.83, or $2.50 a hundred more than normal. That is the reason that the profits in 1916 were so large. Also, under the stimulus of that high price, the mine had exerted every effort to increase its output, and had produced a larger tonnage than in the previous years.

"Q. What have you to say as to the present condidition with reference to the profits as they obtain now, the expense of operation, and the price of lead?

"THE COURT: I thought he had explained that.

"MR. BEALE: No, at the present time, I mean.

"A. I did say that in 1916 the cost of production increased ninety per cent over that in 1910.

"Q. How is it today?

"A. There has been a still further increase.

"Q. How about the price of lead?

"A. The price of lead is now $6.25 per 100 as compared with $6.83 last year. With the increased cost of production, none of the mines of the Coeur d'Alene district today are any better off, if as well off, as they would be under normal conditions, with lead at $4.25.

"Q. How about the income tax, or the revenue tax?

"MR. GRAVES I think I shall object to the war

tax.

WITNESS: Of course that is going to take—

"THE COURT: Just a moment.

"MR. BEALE: Mr. Burbidge, you testified that you were down in the mine. Did you go down to the No. 6 level?

"A. The 600 level?

"Q. The 600 level, I mean?

"A. Yes.

"Q. Did you make a sketch of the ore production down on that level from the 500 down?

"A. Yes.

"Q. Will you kindly exhibit it?

"A. (Handing paper to Mr. Beale) Here it is.

"MR. BEALE: I ask to have this marked as defendant's exhibit.

Said sketch marked DEFENDANTS' EXHIBIT 54.

In connection with the testimony of Mr. Burbidge the attention of the court is requested to this Exhibit No. 54 of Defendants, as showing the condition and extent of the ore shoots as he found them in his personal examination of the Hercules mine.

"Q. Take this defendants' exhibit 54, will you, and kindly explain to the court the condition of those ore shoots as they went down from the 500 level, and point it out to the court?

"A. This is an ore shoot to which I referred as the main shoot.

"Q. You will have to identify it on the map, Mr. Burbidge?

"A. It is the one on the left side of the map, which is the west side.

"Q. Marked in red?

"A. They are all marked in red.

"Q. All right.

"A. The length of that stope on the No. 5 tunnel is 600 feet. On the 200 level it is only 500 feet. On the 400 and the 600 it is also—on the 400 it is shorter. On the 600 the drift has not yet reached the end of it, but it is so near to it, that we are safe in assuming that it will be the same length, 500 feet. The middle stope has a length of about 225 feet. I should go back for a minute to the west shoot and point out that it has a very strong rake to the east, in this direction. The middle stope or shoot comes down almost vertically without any particular rake. What it has is slightly to the west. It it quite evident that at some step very little below the 600 level it will merge in the west stope. The east stope has a length of 150 feet. It shows the same length on the 200 level. It does not appear at all on the 400 level. It is cut out or merged in the middle stope. And there is very little doubt that the middle stope will also be cut off or merged in the same stope, and that below a depth of about 800 feet, there will be but the one shoot of ore, the west shoot.

"Q. How long will that be approximately, Mr. Burbidge?

"A. 500 feet, if it maintains its present width.

"Q. Will you kindly figure out for the court the tons of ore on the 50-foot width of that stope?

"A. On what?

"Q. On this west stope, where you say in 800 feet

they will merge and be one stope there—will you kindly take the length of it as it appears on the No. 6, and give us the tonnage on a 50-foot width or depth of it. I wish that for comparison with the 50-foot as on the No. 5 tunnel level.

"MR. BEALE: I offer this in evidence, if your honor please.

"THE COURT: We will take a recess of ten minutes.

(A short recess was thereupon taken.)

"MR. BEALE: Will you read my last question, Mr. Reporter?

(Last question read).

"Q. And taking also the width of the ore in the shoot as you find it from wall to wall?

"A. That would give a tonnage of 33,333.

"Q. What is the width of the ore shoot, the west ore shoot on the No. 6 tunnel?

"A. The 600, you mean?

"Q. The 600 level.

"A. Average about 12 feet.

"Q. As compared with the drift of it on the No. 5 tunnel level?

"A. 15 feet.

"Q. You spoke about—this was not your language—about writing off the improvements and not considering the money invested there in improvements and plant, and things of that kind, as an asset of the company. Have you any authority for that? Do you know of any written authority upon that subject?

"A. Yes, I have Mr. Hoover's Principles of Min-

ing here.

"Q. Will you kindly read to the court what he says on that subject?

"A. He says: "Equipment expenditure, however, presents an annual difficulty, for, as said, the distribution of this item is a factor in the life of the mine, and that is unknown. If such a plant has been paid for out of the earnings, there is no object in carrying it on the company's books as an asset, and most well conducted companies write it off at once."

"Q. What page of the book is that on?

"A. That page 179 of Hoover's Principles of Mining, volume 2.

Such is the testimony of a mining engineer and a mine manager with an experience of twenty-five years, much of that time spent in the Coeur d'Alene region as manager of some of the largest properties therein operated.

Opposed to this testimony, based upon an inspection of the Hercules Mine and an accurate familiarity with the ore deposits in neighboring mining properties, we have the testimony of the witness Greenough, founded upon an aggregate length of ore shoots, which did not exist, and an underground condition in depth, with which on cross-examination, he proved himself to be entirely unfamiliar. That there may be no controversy about this, his cross-examination is submitted for this Court's consideration:

"Q. Let us pass on now to the question of your familiarity with ore bodies in the region of the Hercules mine. I understood you to say on your direct examination that the ore bodies in this district by depth became more extensive on length.

"A. I did.

"Q. Is your information based upon Mr. Bell's report?

"A. It is not.

"Q. It is based upon what?

"A. Personal observation.

"Q. Personal observation?

"A. Yes.

"Q. Let us take the Tiger-Poorman, the nearest developed property to the Hercules. When were you in that?

"A. I never was in the Tiger-Poorman.

"Q. You don't know anything about that?

"A. The only information I know about that is what appears in the U. S. G. S. Professional Paper No. 62.

"Q. Then you are taking somebody else's information as to that, hearsay?

"A. I am taking that information as to the Tiger-Poorman.

"Q. Where did it appear in that publication that the ore bodies on the levels in the Tiger-Poorman below the collar of the shaft became more extensive lineally as they went downward?

"A. In that particular mine they did not. In fact there was probably a five per cent decrease. I would say, in length.

"Q. There was a decrease in that mine?

"A. Yes, a very slight one.

"Q. And a marked depreciation in metal content?

"A. Yes, there was, so far as my knowledge goes.

"Q. Then, of course, that mine did not substantiate your position. Now, let us take the next mine that is nearest. Would that be the Frisco?

"A. No, it would not.

"Q. Which would be the next?

"A. The Hecla.

"Q. I mean shaft mines now?

"A. The Hecla is a shaft mine.

"Q. Go to the Frisco now—the Frisco mine— when were you in the Frisco mine?

"A. I was never in the Frisco mine. It was full of water during most of my experience up there.

"Q. How do you know that the ore shoots in the lower levels below the collar of the shaft became longer as you went down into the depths of the earth?

"A. I don't know as to that mine, only what I know from the U. S. G. S. Professional Paper No. 62.

"Q. Will you tell one level in that mine that that paper gave as a level that was longer below the collar of the shaft than the level from which the shaft started?

"A. I can't recall any level that did.

"Q. Now, let us pass to the Standard-Mammoth. Were you ever in the Standard-Mammoth shaft?

"A. I was never underground there.

"Q. You were never underground there?

"A. No.

"Q. Where did you get your information that from the collar of the shaft in the Campbell tunnel, as you went downward on the level, that the ore shoots became longer?

"A. I have no direct information as to that.

"Q. Well, that eliminates that one. Now, let us get

to the Gem. Were you ever in the shafts in the Gem?

"A. No. That is an old mine, long abandoned.

"Q. You don't know anything about the levels there being any larger?

"A. No.

"Q. What do you know about the tunnel of the Black Bear?

A. I know—

"Q. That is an old one too?

"A. That has produced very little. That does not amount to very much. (Record pages 1065,1066,1067)

"Q. Now then, we will pass to your own work. Was there a shaft on the Marsh?

"A. There was.

"Q. How deep was it down when you left?

"A. The lowest level was about 900 feet.

"Q. 900 feet?

"A. Yes.

"Q. And you made a report, did you not, of your operations in the shaft to the stockholders on June 3rd, 1916?

"A. I think so, about that time.

"Q. Let me read to you from your report on that?

"THE COURT: No. Don't read until you see whether or not it is going to contradict anything he says, Mr. Beale. Ask him the question first, and let us get along.

"MR. BEALE: This will contradict his general information, if your honor please, as to the depth of the ore bodies in the Coeur d'Alene region, and their richness as they go down, and their largeness. (Record page1071)

"Q. I will ask you if you did not in that report use this language: "Since the first of the year the lowest or 900-foot level has been opened up, and has proved very disappointing. The ore body is considerably shorter and lower in grade than on the levels above." Did you put that in your annual report to the stockholders?

"A. Not in that literal sense.

"Q. I will show it to you. Isn't that a copy of it?

"A. I wouldn't question that at all. I think that is a copy. I would like to qualify that answer to that, if I may." (Record page 1072)

In addition to disclosing that he was not familiar with the conditions of the veins in neighboring mines, his cross-examination further proved the fact that his estimated valuation was founded in part upon what he called the west ore shoot, 325 feet long, that did not contain any ore, and an aggregate length of the three ore shoots developed on the No. 5 tunnel level of 1050 feet, (Record page 1084) and 75 feet more than their combined lengths. The undisputed testimony of Mr. Day on his cross-examination completely disposes of this imaginary west ore body, which we quote from pages 825 and 826 of the Record:

"Q. Without going into details, take the west ore shoot, it went up to what level from the No. 5, or, if you can give it in feet, I would prefer that?

"A. The west ore shoot, that is the larger ore shoot, the one that the history of the mine was made on, goes clear up, that is the one we started on.

"Q. That is the one I am referring to as the middle ore shoot. I mean the west ore shoot.

"A. I don't know just how far that went up. You are speaking of which one?

"Q. The west one.

"A. Well, the large ore shoot and the one we worked on from the surface went right on up.

"Q. That is the center one, isn't it, the middle one, I call it?

"A. I don't call it that. I call it the big ore shoot.

"Q. Well, the ore shoot to the west of the big ore shoot, how far up did that go?

"A. The ore shoot to the west of the big ore shoot?

"Q. Yes?

"A. Well, that didn't go any distance at all, because there wasn't ore found there.

Based upon such ore shoots with indefinite extensions into the earth Mr. Greenough's speculative valuation might just as reasonably have been $20,000,000 as $10,750,000.

Instead of under-paying appellant, Day over paid her as evidenced in the instance of allowing her 1-16 of the estimated cash reserve of $600,000.00, when such reserve was actually very much less. It appears by his answer to interrogatory No. 21 page 95 of the record, that there was $649,359.48 cash on deposit belonging to the Hercules Mining Company on October 28, 1916, and that on that date there should have been deducted therefrom the sum of $278,838.35, that was found due by the Hercules Mining Company to the Northport Smelting & Refining Company, which would leave a cash balance on October 28, 1916, of $370,521.13, instead of $600,000.00. The current expenses of October, 1916, under the terms of sale, should also be deducted from this balance. It is reasonable to presume that the current expenses for the month of October would be equal at least to the average monthly current expenses for the preceding months of that year. Turning to the September statement, we find that the aggre-

gate monthly expenses from January to September inclusive was $1,069,052.03. Divide this by nine to get the average monthly current expenses and we have $118,783.56, deducting this expense from the above cash balance, after paying the indebtedness to the Northport Smelting & Refining Company, and there remains a cash balance of $251,737.57 of which Mrs. Cardoner should have received 1-16 instead of 1-16 of $600,000.00. In other words he over-paid her on her portion of the cash balance $21,766.40, she receiving $37,500.00 where she should have received only $15,733.60.

No more conclusive answer could be made to the attempted argument unsupported by the record to show some error in the evidence of Mr. Burbidge upon which he based the present worth of the interest sold by Mrs. Cardoner than his answer to the question propounded by her counsel on his cross-examination, to wit: (Record page 909.)

> "Q. Is the rest of your estimate, Mr. Burbidge—I am asking this without meaning to be offensive, as I am sure you know—is the rest of the figuring and estimating you have done there done as accurately as that part of it, do you think?
>
> "THE COURT: You need not answer that.
>
> "A. You have not shown any inaccuracy there yet, have you?

If there were any errors or inaccuracies in his testimony, the time to have exhibited them was at the trial and they cannot be formulated in a brief on appeal.

Witness Allen, the agent of Mrs. Cardoner testified that he advised her to sell on the basis of $5,000,000.00 for the entire property, her 1-16 interest in the cash and $20,000.00 for the Burke real estate, and that at the time of her sale he

thought that said sum was a fair valuation and a fair price. (Record pages 619-620.)

Judge W. W. Woods, who had been acquainted with Mrs. Cardoner for thirty years, and who had acted as her counsel when practicing his profession before going upon the bench, stated to her, as to selling her property, that if he were the owner of that property and were offered the price for which she subsequently sold it, he would accept such consideration. (Record pages 711-712.)

Mr. L. W. Hutton, a disinterested partner in the Hercules Mining Company with whom she consulted upon the value of the property, testified that he considered $4,000,000.00 a good price for the property of which she sold a 1-16 interest on the basis of $5,000,000.00 for the whole. (Record page 672.)

Mr. August Paulsen, another disinterested partner with Mrs. Cardoner in the Hercules Mining Company, and whom she also consulted as to the value of the property she contemplated selling to Mr. Day, testified that after he learned what had been paid Mrs. Cardoner for her interest, that he felt that she had gotten a good price for it, and that he would not have been willing to pay any more for her interest than Mr. Day paid. (Record page 686.)

Thus it will be seen, that according to her own deliberate judgment, the judgment of her agent Allen, the judgment of her former attorney, and an acquaintance of over a quarter of a century, the judgment of two of her disinterested partners and that of an intelligent and experienced mining engineer, Mrs. Cardoner received for her interest, if not more, fully all the same was worth at the date of her sale.

Supplementing this testimony with the further evidence that Eugene R. Day made no misrepresentation to her and gave

her all the information he had relative to the property, obtainable from the same source that was free and open to her, that the cash reserve at the date of the sale was $251,737.57 instead of $600,000.00, and that she received $37,500.00 as her 1-16 of the cash balance when she should have received $15,733.60 and that she was overpaid in this item alone $21,-766.40, we are at a loss to understand how it can be contended in this court that the evidence does not support the findings of Judge Dietrich that the price paid appellant for her interest approximated the reasonable market value of the same, and was probably as much as she could have obtained from any other source.

That the value of mining property is uncertain, speculative and problematical, has long been recognized by the Supreme Court of the United States. Speaking upon such subject, the court, in Southern Development Company v. Silva, 125 U. S., 247, on page 252 had this to say:

> "Besides, the quantity of ore 'in sight' in a mine, as that term is understood among miners, is at best a mere matter of opinion. It can not be calculated with mathematical or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially.
>
> "In the case of Tuck v. Downing, 76 Illinois, 71, 94, the court says: 'No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blow-out, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. 'The sight' determines the purchase. If very flattering, a party is willing to pay largely for the

chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop!"

Discussing this feature of the case Judge Dietrich said: (Record page 1396.)

"When we come to consider what in fact was the actual value of the property, we are met with difficulties which both courts and legislators have recognized as well-nigh insurmountable. Because of these difficulties, in this state, as in some other jurisdictions, no attempt is made to estimate the value of mines for taxation purposes. But it does not follow, because the value is difficult accurately to estimate, that an agent or part owner cannot legitimately purchase from his principal or associate owner.

However, in determining this important issue the lower court found against the appellant, and in arriving at that conclusion, with characteristic clearness, had this to say: (Record Pages 1398, 1399, 1400, 1401.)

"In view of these admitted uncertainties and the wide variance between the estimates of the experts, manifestly no safe conclusion as to the reasonable value of the property in October, 1916, can be predicated upon their testimony alone, and therefore I refrain from setting forth an analysis of it. It is of value and weight in connection with the other evidence upon the subject, and I give it consideration in that connection. What, in the main, is the other evidence? Day, though not an expert geologist or mining engineer, and perhaps without experience in

marketing mines, was an intelligent, practical operator, with intimate knowledge of the general conditions in and about this property. His judgment is entitled to some weight, and I am satisfied that he would not have given more for the plaintiff's interest. Some point is made that he bargained with her and sought to secure the property for a much lower figure. But it is not material to the present inquiry to determine whether or not he had the right to deal with her as an equal, if it be assumed that she had all the information that he possessed. It might very well be held that if she knew as much about the mine as he, he had the right to buy her interest at such price as she was willing to take. But be that as it may, whether we condemn or justify his conduct in seeking to get the property for less than he finally paid for it, the fact is that he added to his first offers until he reached the sum of $312,500, exclusive of the cash on hand, or a price upon the basis of $5,000,000.00 for the assets, exclusive of the cash on hand, and there declined to go further. Through Allen the plaintiff sought to get him to increase his bid, but Day definitely declined, and I think was unwilling to pay more. His testimony now as to what he considers the property worth, as well as that of his brothers, Harry L. Day and Jerome J. Day, is in the nature of expert testimony, and, coming from an interested source, is, of course, to be considered in the light of such interest. But if for that reason we put aside entirely their opinion testimony, and impute to that of the opposing engineers equal weight, what have we? We have Day's decision at the time not to pay more. We have the testimony of the two disinterested witnesses Paulsen

and Hutton, the one that the property was worth no more than was paid, and the other that it was worth less. We have no instance where a larger price was ever paid or offered for any interest in the property. We have the sale of the Reeves one-sixteenth interest seven or eight years before, when undoubtedly the actual value was greater than in 1916, for $250,000. We have the unaccepted offers of the owners to sell the whole property in 1905 for $4,000,000, and in 1906 for $6,000,000. If it be said that to Day the interest had a special value because it gave 'The Days' control of the mine, the obvious reply is that to an independent investor, generally speaking, so small an interest would be less saleable, and that therefore its market value, when offered alone, could hardly be said to be equal to one-sixteenth of the market value of the property as a whole. Upon consideration of the entire matter, my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, and in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required. "Brooks v. Martin, 69 U. S. 70, Patrick v. Bowman, 149 U. S. 411."

Assignment of errors Nos. 4 and 5 are similar to 2 and 3 and will not receive additional consideration. It is quite sufficient in this connection to state that in these matters the lower court found specifically against the contention of inadequate price or want of information.

Assignment of Errors Nos. 6 and 7 go to the question of

the right of Day to purchase by reason of the fact that he had not been formally discharged as administrator until subsequent to the date of sale, and assume that the sale was void under the provisions of Section 5543 of the Idaho Revised Codes.

In referring to this same contention, Judge Dietrich said:

> "Indeed, if I have correctly read the record, never was this objection raised or suggested by her until urged by her counsel in the oral argument at the close of the trial." (Record page 1380.)

In this particular the Lower Court was entirely correct. The objection did not appear in the pleadings. It was not suggested at the time of the introduction of testimony and was only interposed as an after thought at the time of the final argument.

If anybody had suggested to Mrs. Cardoner, after receiving her decree of distribution and having the property turned over to her on the 14th day of October, 1916, that she was not the owner of the property she subsequently sold to Mr. Day and did not have a right to make such disposition of the same as she saw fit, her indignation would have known no bounds. Repeatedly, during the summer she clamored for this property and Mr. Day as often told her that he would be glad to turn it over to her and would do so as soon as his attorney and her attorney advised him that the administration of the estate could be closed.

Section 5543 of Idaho Revised Codes is as follows:

> "Sec. 5543. No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale."

This section is wholly without application to the case at

bar. Mr. Day did not purchase any property of the estate. He did not become interested in any sale of any property of the estate. When he purchased Mrs. Cardoner's interest it was not property of the estate of her deceased husband; it was her property. The Probate Court of Shoshone County, Idaho, had entirely lost all jurisdiction over the same and it was entirely beyond the control or possession of Mr. Day as administrator. Let us see what the allegation in this connection is in the amended bill of complaint. The latter part of Paragraph IV thereof is as follows:

> "Such proceedings were thereafter had in the matter of the Cardoner estate that on October 11th, 1916, the Probate Court of Shoshone County, being then and there possessed of complete jurisdiction in the premises, made and entered an order settling the administrator's final account and decreeing final distribution of the property of the estate within the State of Idaho. By the decree all such property, it being the same property described in the conveyance hereinafter referred to, was distributed to and decreed to be the property of the plaintiff as the widow of Damian Cardoner." (Record pages 12 and 13.)

It is not surprising that the Court found that this objection was not interposed except as a grand finale, and after it must have dawned upon appellant's counsel that there had been an utter failure of proofs on the material allegations of the amended bill. Such an objection in the pleading could not have been dovetailed in with her averment therein that the property which she had sold was distributed to her and decreed to be her property by a court of competent jurisdiction. Her pleading shows that the property was beyond the jurisdiction of the Probate Court and the control of Day as

administrator. Her testimony at the trial was to the effect that it was all turned over to her by the administrator pursuant to the decree of distribution on the 14th day of October, 1916.

Section 5627 of Idaho Revised Codes is as follows:

> "In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, and sue for and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal."

The very objects and purposes of this statute were:

(a) To take the property out of the jurisdiction of the Probate Court;

(b) To remove it from the possession and control of the administrator;

(c) To foreclose all claimants, who were not mentioned in the decree of distribution, from asserting any rights to such property and;

(d) To fix the time when the trust relation shall end.

If Mrs. Cardoner, after the date of the decree of distribution, could have sued and recovered from Mr. Day the property referred to in such decree, how can it be contended that as administrator, he had any further right to the control or possession of this property, or that in any sense a trust relation involving the same existed between him and her. The property having passed beyond his control was not subject to any sale on his part as administrator, nor was the probate court possessed of jurisdiction to order such a sale. Therefore, when he purchased from Mrs. Cardoner that which had been

decreed to be hers and which had been delivered to her, he was contracting with her as an individual for something that had been decreed to belong to her.

On the 11th day of October, 1916, the decree of distribution was made and entered which under the statute fixed conclusively the rights of all heirs to the estate and ended any trust control on the part of the administrator, and the property which had been under his control theretofore immediately became the property of the distributee, and the trust relation so far as involved the property then ended. Mr. Day's subsequent discharge as administrator was a mere formality. His final accounts had been passed upon and allowed and all the property had been decreed to Mrs. Cardoner and he had turned it over to her on the 14th day of October, 1916. She had no further interest in the matter of the administration. The property of the estate had been given to her and she could not have been brought back into the probate court upon any subsequently asserted claim of any heir, or any attack upon her title to the property. Upon this proposition there can be no doubt.

The Supreme Court of Idaho, in the case of Connolly v. Probate Court, 25 Idaho, 35, issued its peremptory writ prohibiting the Probate Court, on account of want of jurisdiction, from interfering with or changing its former decree of distribution, and in passing upon this question, on page 45, had this to say:

> "Said probate court having had jurisdiction of the probating of said estate with the power to determine who were the heirs of said Corbett, deceased, and who were entitled to succeed to his estate, and what their respective interests were, and having determined these matters, and

having entered its decree of distribution therein, and the decree not having been appealed from within the time provided by law for an appeal, the decree becomes conclusive as to the rights of all heirs and claimants to said estate.

"In Miller v. Mitcham, 21 Ida. 741, 123 Pac. 941, this court, after citing certain decisions sustaining that proposition, said:

" 'The foregoing authorities clearly and fully establish the proposition that the probate courts have exclusive, original jurisdiction in the settlement of estates of deceased persons, and it is within the jurisdiction of those courts to determine who are the heirs of a deceased person and who is entitled to succeed to the estate and their respective shares and interests therein. The decrees of probate courts are conclusive in such matters.' "

Appellant's suit was not begun on the theory that she did not have the power to sell, and Day did not have the power to purchase on account of any trust relation between him and her, or any control he had of her property as administrator of the estate; but it was based upon the proposition that she subsequently thought she did not get enough for her property.

The Supreme Court of the United States in Clarke v. Boorman's Executors, 85 U. S. 493, in which that court, speaking of a somewhat similar situation, on page 509 of that decision, had this to say with reference to the severed trust relation and the application of the statutes of limitation:

"But when he has parted with all control over the property, and has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes

of limitation assert themselves in his favor, and time begins to cover his past transactions with her mantle of repose. Such is the case before us. With the transfer of the title of the property in 1829, Mr. Boorman intended to, and did, terminate his trust relation to that property. If there was any claim against him after that, which could be asserted by plaintiffs' father, it was a claim for a wrong then done him, and not a claim as of an existing relation of trustee and cestui que trust."

A more concrete answer to this objection could hardly be made than that found in the language of the Lower Court:

"The first contention is predicated upon Section 5543 of the Idaho Revised Codes, which provides that 'no executor or administrator may, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.' And the precise question is, whether, at the time of the transaction of sale, or the negotiations pertaining thereto, the property sold was "property of the estate of Damian Cardoner, of which Day was the administrator. The material facts are as follows: Damian Cardoner died in February, 1915. Upon the request of his daughter, and apparently with the plaintiff's approbation, Day was appointed administrator (with the will annexed), on July 29, 1915, and immediately qualified and entered upon the discharge of his duties. On September 27, 1916, he filed his final account, praying for its approval, and also for a decree distributing the estate. Upon the same day the plaintiff filed a petition representing that all claims had been paid, and that the estate was ready for distribution, and prayed for a decree distributing the whole thereof to her. Upon

October 14, 1916, both plaintiff and Day, and their respective attorneys, being present, the court duly entered an order approving the account, and in compliance with the plaintiff's prayer, distributing the entire residue of the estate to her, consisting of about $120,000.00 in cash, and other property of the value of approximately $35,000.00, besides the mining interest here in controversy, all of which Day forthwith turned over to her. This order or decree was filed for record in the office of the county recorder of Shoshone County on October 25, 1916. The order formally closing the estate and discharging Day from further responsibility was not entered until November 1, 1916, but this fact, upon which the plaintiff chiefly relies to support her contention, is thought to be unimportant. Under the state laws, the property of a deceased person passes to the heirs 'subject to the control of the probate court and to the possession' of the administrator. Sec. 5701. But upon the entry of a decree of distribution the right of possession in the administrator terminates and his authority relative to the property ceases. Secs. 5626 and 5627. The property distributed is no longer a part of the estate entrusted to the care of the administrator. Touching it, both his rights and his obligations are at an end. If upon such distribution the property does not cease to be a part of the estate, when, if at all, is it withdrawn from administration? In a popular sense, of course, it may always be spoken of as the deceased's estate. But section 5543 is to be understood in a legal sense. The principle or reason upon which the section is predicated is obvious: A trustee (the administrator) is not to purchase property to which his trust

relates. But distributed property is no longer a part of his trust; it is out of the trustee's possession and control." Record pages 1376 to 1378.

As hereinbefore mentioned this is not a case where the administrator purchased from the heir property upon which he was administering and there was no question raised in the pleadings about the estate not being closed, or Day dealing with the appellant in any capacity as administrator. She not only alleged that the property had been decreed to her, but she further averred, in referring to the beginning of the negotiations that resulted in the sale, that it was not until after the close of the administration that such negotiations were opened by Allen approaching her upon the subject. This is the language of her amended bill:

> "Immediately after the close of the administration, in the latter part of October, 1916, plaintiff was approached by the defendant, Harry R. Allen." (Record page 14.)

She recognized in her pleadings that the property had passed beyond the control of the administrator, and made it affirmatively appear, before the beginning of the negotiations for the sale of the property, that the administration of her husband's estate had been closed.

This is not a case involving title to property based upon an administrator's deed, nor even on an order of a probate court; nor does it raise the question of when the final order was made releasing the administrator; nor are we concerned with the situation of the administrator violating the decree of distribution and withholding the possession of the property, the title to which passed by such decree. Even if it were a case

where the administrator had purchased the interest of the heir in the estate upon which he was administering, such sale could not be set aside as being void under the provisions of Section 5543, supra. In such a case the transaction could only be held voidable upon a proper showing. The courts construing like and similar statutes to Section 5543 have not held purchases by administrators from the heirs as void but merely voidable. Such was the view of Judge Dietrich, amply supported by the authorities cited in his decision, as follows:

> "But if a different view could be taken, the result must be the same. The purchase by an administrator in person directly from the heir, of the latter's interest in the estate, is not absolutely void, but voidable only, at the option of the vendor. Mills v. Mills, 57 Fed. 873, 878, 879; s. c., 63 Fed. 511. Haight v. Pearson, (Utah), 39 Pac. 479. Golson v. Dunlap, (Cal.) 14 Pac. 576. French v. Phelps, (Cal.) 128 Pac. 772. Littell v. Hackley, 126 Fed. 309. Black on Rescission and Cancellation, Vol. 1, p. 114, Sec. 48. Perry on Trusts, (6th ed.) Sec. 205. Woerner's American Law of Administration, (2d ed.) Sec. 487. And compare Hammond v. Hopkins, 143 U. S. 224, 249, with the earlier case of Michoud v. Girod, 4 How. 503. In Blackington's Estate, 29 Idaho, 310, 158 Pac. 492, there are expressions of ambiguous import upon the subject, but these were expressly declared by the court itself to be obiter. The administration here was technically closed, and Day discharged as administrator, upon November 1st. Thereafter admittedly he had the capacity to purchase, and from that time on for over two months the plaintiff stood upon the contract of sale. After November 1st she accepted the larger part of the

purchase price, and, by such acceptance and her failure to object or protest, approved the transaction and authorized the escrow holder to deliver the deed, Indeed, if I have correctly read the record, never was this objection raised or suggested by her until urged by counsel in the oral argument at the close of the trial. It would be necessary, therefore, to hold that she acquiesced in and ratified the transaction, even were the view taken that the original agreement was made when Day was under disability to contract by reason of the estate not having been formally closed. 39 Cyc. 370. Hammond v. Hopkins, 143 U. S. 224, 251. Mills v. Mills, supra. I do not hold that the comparatively short delay necessarily constitutes laches or estoppel. But by actively participating in the consummation of the unexecuted agreement, after such disability as Day may have had was removed, she directly confirmed the sale." (Record pages 1380 and 1381.)

Assignment of error No. 8 which complains of the finding of the court as to appellant being informed of the known conditions and facts bearing upon the value of the property is without merit as the record overwhelmingly supports such finding, and nowhere discloses any knowledge or information in the possession of Eugene R. Day as to such value or as to the property sold, that was not imparted to Mrs. Cardoner.

Assignment No. 9 which attacks the finding of the court that the price paid appellant approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, is likewise without merit, as such finding, as hereinbefore pointed out, is incontestably supported by the evidence at the trial.

Assignment No. 10 does not contain any matter not ai-

ready covered by preceding Assignments of Error.

CONCLUSION.

The case is wholly free from any deceit or misrepresentation so far as involves Eugene R. Day and his sister Mrs. Boyce; nor is there presented a situation where subsequent developments disclosed an enhanced value in the property purchased. On the contrary, the ore deposits in the vein to a marked degree became smaller and of less value, as demonstrated by subsequent exploration. Mr. Day did not introduce the subject of a purchase. The offer to sell came from Mrs. Cardoner, and he was urged to fix a price that he was willing to pay for her one-sixteenth interest in all the property. In the course of negotiations her agent Allen asked him if he would pay on the basis of $5,000.000 for all the property, to which Day assented, and told him that was the farthest he would go, and if Mrs. Cardoner did not wish to sell on that basis to let the matter pass, that there was no harm done, she had invited from him an offer and he had made one.

There is no rule of law or principle of fair dealing that requires one partner or an agent, who has been solicited to purchase the interest of another partner in partnership property, or the property of a principal, to pay therefor any price which the seller may wish to fix on the property sought to be disposed of. In this transaction Mr. Day paid more than the property was worth. There were entirely legitimate reasons for doing so, and Mrs. Cardoner profited thereby. She well knew that during the life time of her husband, the Hercules Mine had been operated and the Hercules Mining Company conducted without friction; that the respective partners worked together harmoniously and that Mr. Day for many years had been the appointed and trusted mana-

ger. However, for reasons hereinbefore discussed, she immediately after the receipt of the property of her deceased husband's estate, determined to sell the same and thereby escape any trouble that might be instituted by contending legatees named in her husband's will, and she concluded that Mr. Day would be the most likely purchaser if it could be made to appear to him that her interest in the property might be sold to an antagonistic party, or at least to a company that was competing in the smelting and refining business and from which the Hercules Mining Company had been unable, in the summer of 1915, before launching upon its smelting and refining enterprise, to secure a satisfactory smelting contract. Naturally, Mr. Day would not wish any unfriendly partner that would strike a discordant note in the harmonious partnership relations that had existed for years, and as naturally might be willing to pay for Mrs. Cardoner's interest more than the actual value thereof and more than she could secure elsewhere on account of the large interests already held by the members of the Day family in the Hercules group of lode mining claims and in the Hercules Mining Company. The fact that subsequently, disclosures in mining on the Hercules vein showed a depletion of ore reserves and a decrease in ore values constituted no excuse and no inducement for Mr. Day or Mrs. Boyce to accept a return of the purchase price from Mrs. Cardoner. Conscious of the rectitude of his conduct and the fairness of his treatment of appellant Eugene R. Day would not take back her money and consent to a decree of rescission if he knew that there would never be another dollar's worth of ore shipped from the Hercules mine. He and his sister had been libeled by false allegations in the appellant's pleadings, which were given free and full publication to the world. They are large

mine owners and operators in the far-famed Coeur d'Alene region. Their reputations for integrity and honesty are by-words in that district, and there is no money consideration that could induce them to permit the false charges made by the appellant to go unchallenged and disproven.

The record being entirely free from error, appellees respectfully urge that the decree appealed from be affirmed.

Respectfully submitted,

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Residence and Post Office Address,
Wallace, Idaho.

No. 3273.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

ON APPEAL FROM THE DISTRICT COURT OF THE DISTRICT OF IDAHO.

Mathilde Cardoner,
Appellant,

vs.

Eugene R. Day, et al.,
Appellees.

REPLY BRIEF OF APPELLANT.

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Mathilde Cardoner,
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REPLY BRIEF OF APPELLANT.

Preliminary.

Three briefs have been filed by appellees, one by appellee Harry R. Allen, another by Harry L. Day and Jerome J. Day, and a third by the remainder of the defendants. The brief filed in behalf of Allen will not be further referred to in this brief. The brief filed by Messrs. Babb and Smith in behalf of Harry L. Day and Jerome J. Day will be referred to as appellees' brief number three, and the brief filed by Messrs. Beale

and Wourms in behalf of a large number of the other defendants will be referred to as appellees' brief number two.

There are certain legal propositions laid down in appellant's original brief which are in the main either agreed to or not disputed by the appellees in their brief number two, but some propositions stated in brief number three would indicate that the theory upon which this case was tried in the court below was departed from. A large portion of brief number two (pages 13-22) is taken up in discussing wherein appellant failed to establish the allegations of her bill of complaint. In reply to this it is sufficient to say that in the allegations affecting the merits of the case, that the defendant Eugene R. Day failed to make the necessary disclosures due to appellant on account of their fiduciary relationship when he purchased her interest in the Hercules mine, and failed to give a price that approximated near the actual value of the property, and such appeal contained the other necessary formal allegations (and of this there is no dispute), it would be sufficient notwithstanding there may have been charges of actual fraud not established by the evidence.

Brooks v. Martin, 69 U. S. 70.

Of the ten assignments of error on which this appeal is based, it is not thought necessary to the proper presentation of appellant's case to add anything to what has heretofore been said with reference to assignment

number one and assignments numbers ten and eleven, which deal with the first, fourth and fifth final issues, but this reply brief will be confined to the two final issues, numbers three and four, and questions raised by appellees.

SECOND FINAL ISSUE.

Did the defendant Eugene R. Day prior to purchasing from plaintiff her interest in the partnership property of the Hercules Mining Company communicate to her all material facts known to him and obtained by him by reason of the position he occupied as managing partner of said enterprise or did he conceal from her any such material facts so shown to him, and which information was not known to her and which was necessary to enable her to form a sound judgment as to the full value of the Hercules Mining property at the time of such sale and that all such disclosures made prior to such purchase as under the circumstances the law required of said Eugene R. Day to make to the plaintiff prior to the execution of the deed and contract conveying said property to the defendant Eleanor Day Boyce?

THIRD FINAL ISSUE.

Did the price paid for appellant's one-sixth interest in the Hercules mining property, to-wit, $350,000, approximate reasonably near its value?

BRIEF OF THE ARGUMENT.

Point One.

The opinion of the trial court filed in a cause is not findings of ultimate facts.

Authorities:

Yorke v. Washburn, 129 Fed. (8th Circuit) 564;

Dickinson v. Bank, 16th Wallace 250.

Point Two.

A party cannot assume an attitude in the Appellate Court inconsistent with that taken by him before the trial court, and the parties are restricted to the theory upon which the case was prosecuted or defended and determined in the trial court.

Authorities:

3 C. J. P. 718, and cases cited from all courts, both federal and state.

Point Three.

A suit in equity on appeal to the United States Circuit Court of Appeals from a United States District Court is tried *de novo* on both law and facts.

Authorities:

Thrallman v. Thomas, 111 Fed. 277;

Silver Mining Co. v. U. S., 175 U. S. 463;

Blaze v. Garlington, 92 U. S. 1;

Waterloo Mining Co. v. Doe, 82 Fed. 45;

Van Idenstine v. National Discount Co., 172 Fed. 518;

Bush v. Bronson, 248 Fed. 619;
T. & P. Railway Co. v. Railroad Commission, 232 U. S. 338;
Washington Security Co. v. United States, 234 U. S. 76.

POINT FOUR.

When the conclusion reached by the trial court in an equity case is clearly wrong, or in case he makes a serious mistake in the consideration of evidence, the case will be reversed.

Authorities:

Same as under Point Three.

POINT FIVE.

The burden of proof is upon a managing partner who purchases a copartner's interest in partnership property to show that the purchaser had disclosed to the seller all the information known to him or in his possession, and that the buyer paid a price that approximated reasonably near the actual value of the property.

Authorities:

Brooks v. Martin, 2 Wallace 70;
Perry on Trusts, secs. 194, 195 to 206;
Elliot on Contracts, sec. 74;
Rowley on Partnership, 242, 400;
Nelson v. Matsch, Am. Cas. 1912, D 1124 and note;
Pomeroy's Equity Jur., sec. 958.

Point Six (Fact).

The testimony in this case does not establish that Eugene R. Day, the managing director of the Hercules Mining Company, disclosed to Mrs. Cardoner, the seller, such information as he had in his possession and which was necessary for her to possess in order to form a sound judgment as to the value of the property sold.

Point Seven.

It is incumbent on a managing director to show by convincing evidence, where he has purchased the interest of a copartner in partnership property, that the seller had full information and complete understanding of all the facts concerning the property and the transaction itself, and that the seller gave a perfectly free consent and that the price paid was fair and adequate, and that the buyer made to the seller a perfectly honest and complete disclosure of all the knowledge concerning the property possessed by himself or which he might with reasonable diligence have possessed and that he has obtained no undue or inequitable advantage in the purchase.

Authorities: Same as under Point Five.

Point Eight.

The ordinary rules governing cases of fraud in transactions between parties dealing at arms' length, or between whom no fiduciary relations exist, do not apply in dealings between partners, and especially in cases

where managing partners purchase the interest of a copartner in partnership property.

Brooks v. Martin, 69 U. S. 70;
2nd Pomeroy's Equity Jur., 4th ed., secs. 955, 956, 957, 958, 959 and 963;
Cunningham v. Pettigrew, 169 Fed. 335;
Thorne v. Brown, 63 W. Va. 603;
Miller v. Ferguson, 107 Va. 249, 122 Am. St. Rep. 840, 13 Ann. Cases 138;
Goldsmith v. Koopman, 152 Fed. 173;
Byrne v. Jones, 159 Fed. 321.

POINT NINE.

The rule that where a person conducts an independent investigation he cannot rely on the representation of the purchaser does not apply in cases where fiduciary relations exist, and this is especially true in cases where a managing partner purchases property from a copartner who has confidence in his integrity.

Authorities: Same as under Point Eight.

POINT TEN (FACT).

Mrs. Cardoner conducted no independent investigation from which she did or could determine facts upon which she could base a sound judgment as to the value of the property sold; nor was she advised by any disinterested person capable of giving her such information; and such information was peculiarly in the possession and under the control of Eugene R. Day, the managing partner who purchased her property.

Point Eleven (Fact).

The three hundred fifty thousand dollars paid by Eugene R. Day to Mrs. Mathilda Cardoner for the latter's interest in the Hercules mine and other properties of the Hercules Mining Company did not approximate reasonably near to the value of said property, nor is there substantial evidence upon which to base such ultimate fact.

Point Twelve (Fact).

The appellees did not establish by any evidence that was clear and convincing that Eugene R. Day paid the sum of money approximating the reasonable value of Mrs. Cardoner's interest in the Hercules mining properties when he purchased the same.

Point Thirteen (Fact).

The evidence, according to the great weight, establishes that the value of the Hercules mine was much greater than the basis upon which its value was estimated when Eugene R. Day purchased the interest of Mathilda Cardoner, and the three hundred fifty thousand dollars consideration paid for said interest was grossly inadequate.

Point Fourteen.

The sale of the one-sixteenth interest in the Hercules mine to Eugene R. Day while he was administrator of the estate of Darnian Cardoner was void.

Authorities:

Michond v. Girod, 4 Howard 502.

ARGUMENT.

I.

Counsel for appellees seem to think that the opinion of the trial court contained findings of fact and conclusions of law binding upon the parties. We do not so understand the law. No findings or conclusions were made in this case. (Appellees' brief No. 3, p. 83.)

York v. Washburn, 129 Fed. 564;
Dickinson v. Bank, 16 Wallace 250.

The same contention is made at page 35 of their brief No. 2. This case is on trial *de novo*, but certain weight is given to the decision of the trial court to which reference will be hereinafter made.

II.

In appellees' brief No. 2, at page 35, under the title, "FINDINGS," the contention is made that the findings of the court were based upon "uncontradicted facts and testimony that greatly preponderated in favor of appellees," and that such being the case, this court would be bound thereby. If the above conditions exist, this court is bound by the decision of that court. But this suit being in equity is tried *de novo* upon the whole record. It is true findings of the trial court when made are given consideration upon appeal, but they are by no means conclusive. The following are some of the cases upon this proposition:

"Findings of fact are not conclusive, but persuasive."

Thrallman v. Thomas, 111 Fed. 277.

"In an equity suit on appeal the case is tried *de novo* on both law and facts."

Silver Mining Co. v. United States, 175 U. S. 463 *et seq.;*

Blaze v. Garlington, 92 U. S. 1.

"On an appeal in an equity case, findings of fact made by the court below are entitled to some weight, but are not binding on the appellate court. The whole case is before the latter court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits."

Waterloo Mining Co. v. Doe, 82 Fed. 45.

"In an equity action the appellate court must weigh the evidence and determine whether on such evidence the decree is right."

Van Iderstine v. National Discount Co., 174 Fed. 518.

"The findings of the trial judge is entitled to consideration, and unless clearly against the weight of the evidence that exist by some application of the law, will not be disturbed on appeal. On the other hand, if the finding is clearly against the weight of the evidence, the appellate court in a procedure in equity will reverse it, as on appeal the facts as well as the law are open to consideration."

Bush v. Bronson, 248 Fed. 383.

"The conclusions of the trial judge are accepted by us as correct unless the evidence is found to preponderate decidedly against those conditions."

Estep v. Kentland etc. Co., 239 Fed. 619.

The Supreme Court of the United States has laid down the following rule:

> "Findings of fact concurred in by two lower courts will not be disturbed on appeal by the Supreme Court in an equity case unless clearly erroneous."
>
> Texas & Pacific Ry. Co. v. Railroad Commission, 232 U. S. 338;
>
> Washington Security Co. v. United States, 234 U. S. 76.

It seems to us that the Supreme Court of the United States, in laying down the rule last mentioned, intends that the Circuit Court of Appeals shall also pass upon the facts as well as the law, and determine the case upon the merits, irrespective of the action of the trial court, or else the rule would not be stated to the effect: "Where two lower courts pass upon the facts," the Supreme Court will not disturb it unless clearly erroneous. If this court should accept the facts found by the trial court, certainly but one court would be passing thereon.

III.

There is some attempt on the part of appellees in their brief No. 3 to change the theory on which this case was tried in the court below, as shown by point 3, at page 114, to the effect that "a transaction cannot be appealed on the ground of property of alleged fiduciary relations where the complaining party conducted an independent investigation, acted through her own

agent, consulted her friends, and did not rely upon the fiduciary to furnish information."

We have read each of the cases cited under this point and not one of them, with the exception of Colton v. Stanford, 23 Pacific 16, had any reference to contracts where fiduciary relationship was concerned. In the case just mentioned Mrs. Colton had sold her interests in large properties to the partner of her husband. She had especially selected expert accountants, lawyers of high standing and ability, and had made a thorough investigation of all the properties. She had further stated that she had absolutely no confidence in anything that her partners might say to her and would believe nothing they would tell her. That she not only had access to all information of the partnership, including its books, but that she availed herself of the privilege of having the property and accounts thoroughly examined and passed upon by competent persons acting for her. That she received full value of the property sold and all information in connection therewith had been disclosed to her. Under this state of facts it was held that the contract would not be rescinded. The conditions do not apply to this case.

We call the court's attention to the following quotation from the opinion of the trial court, beginning at page 1381 of the record:

"Finally, can a reason be found in the fact that Day was, and for a long time had been, the manager of the mine, for holding the sale voidable? In this aspect we have the case of an agent dealing with his principal touching property to which the agency relates.

Under what limitations or subject to what conditions could he make a valid purchase? His position doubtless gave him peculiar opportunities for knowing all the facts and estimating the reasonable probabilities, and it was his duty to deal fairly with the plaintiff. He could lawfully purchase her interest, but before doing so he was bound to disclose to her the facts and conditions which had come to his knowledge as manager, bearing upon the value of the property. He could take no advantage by misrepresentation, concealment or omission to disclose. He was not required to express himself relative to matters merely of speculation or surmise, but in so far as he chose to give an opinion he was bound to act honestly and in good faith. Byrnes v. Jones, 159 Fed. 321. In a sense, of course, the two parties could not be put upon the same footing. Personally, the plaintiff had had no practical experience in mining, and presumably, therefore, was less competent than Day to form an intelligent opinion or to speculate upon the ultimate question of the commercial value of the property."

From the above quotation it will be seen that this case was tried in the court below upon the theory that the fiduciary relationship of partner and managing partner existed between these parties and that the law applicable thereto should apply. Not only did the court take this view of it, but likewise counsel took the same view, as will appear from the record at pages 558 to 569, and attention is especially called to the statement of Mr. Beale at page 565, in which he quotes from the case of Brooks v. Martin, 69 U. S. 70, as being authority upon which this case should be based, and this case having been tried below upon this theory,

it is too late to change the theory in the Appellate Court.

3 C. J., p. 718, and cases cited from all courts, both federal and state.

The Effect of an Adverse Decision by the Trial Court.

The appellant is confronted in the beginning with an adverse decision of the trial court upon the facts and especially upon the two propositions laid down in Brooks v. Martin, 2 Wallace 70-82, to the effect that full disclosures as to the partnership affairs were made by Eugene R. Day to Mrs. Cardoner, and that a consideration approximating near the reasonable value of her property was paid therefor.

It is our understanding that the evidence in this case and others like it must be such as to establish the above facts: that the burden was on the appellees to establish such facts; that appellees must clear the transaction of every shadow of suspicion, or at least establish these facts by clearly convincing testimony. (Perry on Trusts, sec. 109.) Indeed this very section of Perry on Trusts is quoted as the law applicable to the case in appellees' brief No. 2 at page 49, as follows:

> "But there are exceptions to the rule, and a trustee may buy from the *cestui que* trust, provided there is a distinct and clear contract ascertained after a zealous and scrupulous examination of all the circumstances; that the *cestui que* trust intended the trustee to buy and there is a fair consideration and no fraud, no concealment, no

advantage of information taken by the trustee acquired by him in the character of trustee."

But appellees should not have stopped in the midst of the quotation. Their authority continues as follows:

"The trustee must clear the transaction of every shadow of suspicion, and if he is an attorney he must show that he gave his client who sold him full information and disinterested advice. Lord Eldon admitted that this exception was a difficult case to make out, and it may be said generally that it is difficult to find a case where such a transaction has been sustained. Any withholding of information or *ignorance of all his rights* on the part of the *cestui,* or any inadequacy of price, will make such a purchaser a constructive trustee."

We cite and will quote from many authorities, federal, state and text-books and especially refer to

2 Pomeroy Eq. Jur., sec. 968;

1 Perry on Trusts, secs. 109, 194, 195, 206, 318-20;

1 Elliott on Contracts, sec. 74;

1 Rowley on Partnership, secs. 342, 384, 400, 403;

Brooks v. Martin, 2 Wallace, 70-87;

Nelson v. Matsch (Utah), 1912 D Ann. Cases 1124;

Byrne v. Jones, 159 Fed. (8th C. C. A.) 321;

Michard v. Girod, 4 Howard 555.

The rule which applies to cases of law to the effect that the appellate court will not disturb the findings or judgment of a trial court, if there is substantial

evidence to support them, does not obtain in appeals from decrees in equity cases. In such cases the trial is *de novo*. It is held by all the federal courts that both law and fact will be reviewed, and while the weight given to the decision of the trial judge has been variously stated, we believe that the following clearly states the rule:

> "The finding of the trial judge is entitled to a consideration, and unless clearly against the weight of the evidence, or there was some error in the application of the law, it will not be disturbed on appeal; on the other hand, if the finding is clearly against the weight of the evidence, the appellate court in a procedure in equity will reverse it, as on appeal the facts as well as the law are open to consideration."
>
> Bush v. Bronson, 248 Fed. 383.

Even the Supreme Court will reverse the case on the facts in equity, although such facts have been "concurred in by two lower courts," if clearly erroneous.

> Texas & Pacific Railroad Co. v. Ry. Com., 232 U. S. 338.

From a fair consideration of the authorities, it would seem to be incumbent upon the appellant to establish that the trial court decree was clearly against the weight of evidence.

There is no serious conflict between our contention on this point and that of appellees, as witness appellees' SECOND POINT, at page 83 of brief No. 3, as follows:

"A finding of fact made by the trial court on conflicting evidence is presumptively correct and will not be disturbed in the absence of serious mistake in the consideration of evidence or error in application of the law."

Citing

G. N. Ry. Co. v. Pa. etc. Co., 242 Fed. 799.

This is not an ordinary case wherein the burden of proof was on appellant. Where confidential relations are shown and a contract proven wherein the managing partner had purchased a copartner's interest in partnership property, the whole transaction is presumptively fraudulent and voidable, subject to cancellation, and unless this presumption of fraud was overcome by appellees by clear and convincing testimony, the trial court erred in dismissing the bill.

It is this rule that we believe the trial court overlooked. At no place in his opinion does the trial court suggest that appellees had the burden of proof or that the ordinary rules of evidence did not apply. At no place does he suggest that the appellees were burdend with establishing the fairness of the transaction and that it was free from fraud; that all information in Day's possession necessary for Mrs. Cardoner to have formed a sound judgment as to value had been disclosed.

The case is treated as any ordinary one involving alleged fraudulent representation. In that character of case the burden of proof is upon the plaintiff to establish fraud by clear and convincing testimony; whereas in the present case, and those of like character,

the defendant has the burden upon him to prove, not only that the transaction was fair and free from fraud, but that all disclosures as to knowledge in possession of the purchaser were disclosed to the seller. At page 1321 of the record the court discusses the rule, but not the burden of proof.

Our burden in this court might be stated as follows, and we would endeavor to show:

THAT THE TRIAL COURT IS IN ERROR IN DISMISSING APPELLANT'S (PLAINTIFF'S) BILL, IN THAT IT CLEARLY APPEARS FROM THE EVIDENCE THAT THE DEFENDANT IN THE TRIAL COURT DID NOT MEET THE BURDEN UPON THEM TO OVERCOME THE PRESUMPTION OF CONSTRUCTIVE FRAUD BY PROVING: FIRST, THAT THE PRICE PAID FOR MRS. CARDONER'S PROPERTY APPROXIMATED REASONABLY NEAR TO A FAIR AND ADEQUATE CONSIDERATION; AND SECOND, THAT ALL INFORMATION IN POSSESSION OF EUGENE R. DAY WHICH WAS NECESSARY TO ENABLE MRS. CARDONER TO FORM A SOUND JUDGMENT AS TO THE VALUE OF WHAT SHE SOLD TODAY WAS COMMUNICATED BY THE FORMER TO THE LATTER.

We take it to be self-evident that if there is not some substantial testimony to show that the required disclosures were made to Mrs. Cardoner by Eugene R. Day; or if the testimony showed he was in possession of facts the law contemplates should be disclosed, and it is not shown they were so disclosed, or if the evidence does not show they were so disclosed, then we have complied with the rule as to one of the requisites upon which said sales are held to be invalid.

All the disclosures made by Eugene R. Day to Mrs. Cardoner are set out in narrative form in our original brief, at pages from 29 to 64, inclusive. It is claimed by appellees (brief No. 3, page 94) that we did not set out all such information, referring to certain testimony there copied (pages 86 to 94, brief No. 3) which we are glad for the court to consider. We do not believe that any member of this court will be able to say that he has information from which he could make a sound judgment as to the value of the Hercules Mining Company's property, after reading all such testimony. Indeed, it is so admitted by appellees in their brief (brief No. 2, page 45 *et seq.)*, from which we copy as follows:

"It is unreasonable to suggest and absurd to contend that they should have gone through all the records of the Hercules Mining Company, extending over a period of 16 years' operation, to disclose to Mrs. Cardoner a tabulated mass of figures such as is found on page 102 of appellant's brief. He did not have the information in his possession and he never acquired the information as manager to enable him to furnish such figures to appellant, and he could not from his knowledge supply the data from which such figures were made. In fact, it took weeks of effort and labor by most skillful and learned accountants to assemble the facts for the answers to the interrogatories, and upon which some accountant must have spent much time and effort in tabulating such figures. Mrs. Cardoner or anyone she might designate had a free access to the records of the Hercules Mining Company as they had, and he was not required to hire men especially fitted for such work to compile data she refused

to have compiled for herself. The situation would have been different if he had denied her access to the books, the mill or the mine.

"It is believed no decision can be found in which there has been decreed a rescission of sale, where there was not exhibited in the case a willful misrepresentation of the conditions or a deliberate concealment of facts exclusively within the knowledge of the trustee. Hence the authorities and text cited in appellant's brief are wholly inapplicable to the case at bar. The pivotal point in such cases being an intentional false representation or a knowing concealment of material facts within the possession of the purchaser."

We call the court's attention to the last paragraph of the above quotation, from which it will be seen that appellees' theory of the law is entirely erroneous. The fact is, there need be no intentional fraud, intentional misrepresentation or intentional concealment. It is sufficient if full and complete disclosures were not made, whatever might have been the reason therefor.

If the first paragraph of the above quotation correctly states the fact, it is quite evident that Mrs. Cardoner was not in possession of all the facts necessary for her to make and form a sound judgment as to the value of this property. The "weeks of effort of skilled and learned accountants" referred to by appellees resulted in furnishing the facts and figures upon which the experts based their estimates of value given at the trial of this suit. Mr. Burbridge stated that he was not content with the facts and figures so furnished by answers to interrogatories, but that he

made a personal inspection, examination and observation in the mine, and further stated:

"I should have measured up the width of the stopes. That is about the only thing I would do which I did not do in this particular case, and the reason I did not do it in this case is that my view of the correct method of determining the value was to assume a like production for the future of the mine as its past."

It is not pretended by Eugene R. Day that he disclosed to Mrs. Cardoner any information having in view the purchase of the mine from her. Indeed, he testified that he had not thought of buying the mine until approached by Allen on the 18th or 20th of October, 1916. He stated:

"She wanted to know all the property interests because she was coming into it, and she wanted to know all about it." [Rec. p. 724.]

"She was interested in knowing every detail concerning the business. She wanted to know every particular thing." [Rec. p. 730.]

But at these times she was not trying to sell nor he to buy, if his testimony is given credence. Under such circumstances, no doubt, he would be justified in disclosing to her only such information as was in his mind or memory.

We attempted, at page 42 of our original brief, to lay down certain rules for determining the value of this property, but our ignorance was roundly scored by learned counsel for appellees (brief No. 3, pp. 142-3). In our original brief we stated:

"We believe from all the testimony in this case with reference to value that the following are among the

most essential facts necessary to determine the value of the mine, stated in the order of their importance:

1. Net income year by year and particularly the present income.
2. The dividends declared year by vear and aggregate.
3. The previous history of the mine and its production.
4. The conditions as they appear within the mine on the date value is sought to be proven.
5. The history, production and depth of mines of like character in the same locality or district."

To these views appellees do not agree, and charge all our manifold errors and miscalculations as to values to our ignorance thus displayed, and proceed to make their "five points" in lieu of ours, as follows (Appellees' brief No. 3, pp. 142-3):

"We are confident the following items, in their respective order, are those which should be considered in determining the value of the mine:

1. The district where located and the history of neighboring mines.
2. The extent, mineral content, permanency and location of ore bodies.
3. The cost and means of extraction, transportation, treatment, and the amount of mineral content that can be saved and marketed.
4. The amount of ore extracted and the amount of ore in reserve.
5. Approximate value of probable ore."

(It is quite evident that their items Nos. 1, 2, 3 and 4 correspond respectively with our 5, 4, 1 and 3; and that the only additional element of value suggested

by them is their No. 5, which we believe is included in our Nos. 1 and 2.)

In comparing our "five points" with theirs, we find largely a distinction without a difference, and cannot agree that "it accounts for the false view the appellant has of the case." (Appellees' brief No. 3, p. 143.) The view we have may be "false," but it is still our view notwithstanding appellees' criticism. We believe that each of appellees' "five points" are essential to determine value. We only stated that ours were "among the most essential facts." Now, assuming appellees to be correct, as far as they went, WHAT DISCLOSURES DID EUGENE R. DAY MAKE TO MRS. CARDONER, OR WHAT FACTS DID HE FURNISH HER FROM WHICH SHE COULD HAVE DETERMINED VALUE IF IT WERE NECESSARY FOR HER TO HAVE THE INFORMATION CONTENDED FOR BY APPELLEES AS SET OUT ABOVE?

With reference to their first point, he told her that the Tiger-Poor Man had paid to 1500 or 1800 feet below the creek level—and that was all.

He gave her absolutely no information as to the extent, mineral content, permanency and location of ore bodies.

With reference to the cost and means of extraction, transportation, treatment and the amount of mineral content that could be saved and marketed, he practically gave no information. He claims he told her "about the Wallace mill," that they had bought an interest in North Port Smelter and Pennsylvania Refinery, and that they could see the ore from the time it was knocked down in the mine until marketed, all

of which was a great advantage to the company. But the essential facts as to cost, value of these properties to the company and the amount of the mineral content that could be saved and marketed, were not mentioned.

The amount of ore that had been extracted was not mentioned. Neither was there any mention made of the amount of ore in reserve, or any information given from which these facts could be determined.

There was not the slightest attempt to approximate the value of the probable ore.

Appellees insist that information necessary to determine these five items was required in arriving at value. It is not remotely pretended that such information was furnished or disclosed by Eugene R. Day. Assuming appellees' position to be correct, it was the duty of Day to disclose this information to Mrs. Cardoner, and it should have been disclosed as soon as he began negotiations for the purchase of the property. The law requires this; appellees admit as much, and they admit she was not furnished any such facts. (Appellees' brief No. 2, p. 45.) If appellees are correct in their position that it was not incumbent upon Eugene R. Day to disclose fully the partnership conditions as reflected by the books of the company, notwithstanding it would have been some trouble to him, then the Supreme Court, in Brooks v. Martin, and the Circuit Court of Appeals, in Byrne v. Jones, 159 Fed. 321, were very much in error in their conclusion.

The appellees, in their brief No. 3, beginning at page 147, under the heading, "Mrs. Cardoner's Knowledge," set out in 15 numbered paragraphs the infor-

mation it is claimed she possessed at the time she sold her interest in the mine. If every word of this was supported by substantial evidence, it would fall far short of such knowledge as appellees contend is needed to determine value. (Brief No. 3, p. 143.) We make the following criticisms of these fifteen paragraphs:

Paragraph 1 is not based on any testimony. [Rec. p. 455.]

Paragraph 2 is not based on any testimony. She was asked if she did not come at such a date, and answered, "I suppose so. I don't remember the date." [Rec. pp. 459-60.]

Paragraph 4 is a correct statement.

Paragraph 5 is a correct statement.

There is no testimony to show she filed a divorce suit. She was asked, "You remember, Mrs. Cardoner, commencing a suit for divorce against Mr. Cardoner, do you not?" to which she answered, "It was not divorce." [Rec. p. 461.]

Paragraph 7 is correct except that she went to Spain in 1906. The amounts stated are correct for the end of the year.

Paragraph 8 is erroneous. The evidence shows that Mr. Cardoner received the statements.

Paragraph 9 is correct.

Paragraph 10 is misleading. She was not in "constant touch" with anyone. She had one conversation with Paulson about the mine. She denies talking about it to Hutton; he says he talked to her once about it. Allen claims to have had conversations about the mine, but no one testified to having discussed with her "the

improvements made at the mine from 1906 to 1916." Nor is there any substantial evidence of "reliable information."

Paragraph 11 is correct as to her knowledge that the mine was worked down to the Hummingbird tunnel. The remainder is misleading. The experts, as well as Day, based the life of the mine on the depth below the creek level, and not upon the depth of the mine from the apex.

Paragraph 12 is to an extent correct, based upon Day's testimony. He testified that he told Mrs. Cardoner that the Tiger-Poor Man had been worked 1500 or 1800 feet below the No. 5 tunnel, that the Hercules had cut "good ore" at the 200, below the No. 5 tunnel, and had penetrated the ore at the 410 level; that by owning the smelter and refinery they got all that was in the ore.

Paragraph 13 is misleading. There is no evidence that she knew any of the matters stated therein.

Paragraph 14 is not a statement of knowledge of any fact.

Paragraph 15 is not based upon any evidence in the case.

Taking everything to be true that was testified to by appellees' witnesses, the information possessed by Mrs. Cardoner would have fallen far short of sufficient from which value could be determined. She was an old lady of 64 years, had been out of touch with America for 11 years, justifiably suspicious, uneasy about her property rights, and in just the frame of mind in which she needed the disinterested advice of

Eugene R. Day, the trusted manager of her interests, and her husband's long-time partner and friend. Allen's testimony shows he was interested more in obtaining a commission for the sale of the property than in giving her disinterested advice. His own testimony shows that he encouraged the sale, using very doubtful methods in doing so, under the circumstances. Paulsen, a member of the Hercules partnership, refused to advise her or to estimate the value of her property. Hutton claims to have told her that the property was worth $4,000,000; a statement he could not have believed himself, and which was calculated to push her on to an improvident sale. Allen was not a mining man, nor capable of giving advice as to the value of this property, and disclaimed that he could do so. [Rec. p. 637.] Mrs. Cardoner was not particularly familiar with mining [Allen's testimony, p. 654]; her husband was a strong, forceful man, who had managed his own affairs. [Rec. 654.] Judge Wood did not claim to be an expert and stated that he did not have sufficient experience to be able to give advice as to value. [Rec. p. 714.] According to the testimony, the only persons who claimed to have talked to her were Paulsen, Hutton, Allen and Eugene R. Day. From the above it is quite evident that she did not have capable disinterested advisers. The most capable, Allen, like any other broker (which the court found him to be [Rec. p. 1375], was using the usual broker tactics, talking the property down to bring about a sale, that he might earn a commission. The only person capable of giving the advice needed was

trying to buy the mine. He claimed he did not first approach her to buy; she claims he did. The court concluded that Day was the first to mention the purchase of the property. [Rec. p. 1390.] Whatever may be the fact, we find Day bargaining for the property, and before buying he never made the slightest disclosure to her as to the business conditions of the company, nor did he disclose to her any information for determining value, having in view at the time his purchase of the property. He simply went into it to buy as cheaply as he could, first offering $275,000 and then going up to $350,000, an increase of 30 per cent over his first offer. In regard to this he said:

"Q. It was your purpose and intention, when Mr. Allen first came to you on or about the 20th of October, to buy this woman's interest for the very least money you could get it for. A. I wanted to buy it for as reasonable a price as I could.

Q. Just as cheap as you could get it? A. I didn't want to pay more than it was worth at any time.

Q. But you would have taken it for $275,000, wouldn't you? A. Yes.

Q. That is to say, you were making as good a trade with her as you would try to make with me? A. I would try to make the best trade I could make." [Day's testimony, rec. p. 807.]

This does not look like good faith and a disposition to pay a fair price. A man who would thus trade with a partner, an old woman, sick who had no disinterested, capable advisers, would not likely disclose, or want to disclose, all the knowledge he possessed so she could form a sound judgment as to value. It

would be against his intention "to make the best trade he could make" to give her this information, and it was not given to her. It is this very spirit that the law condemns, and for these selfish reasons a full disclosure is required. There is no compatibility between making a full disclosure, as the law requires, and the making of the best trade possible. They are inconsistent and will not occur in the same transaction. No disclosures were made, or pretended to have been made, with a view of having her form a sound judgment as to value. As stated by Day, he traded with her as he would have traded with the attorney who was questioning him. All disclosures claimed to have been made by Day were made long before October 20, the day which he testified negotiations for purchase began. We have copied in our original brief, from pages 29 to 39, a complete narration of all statements made by Day to Mrs. Cardoner about the property as testified to by him, none of which did he claim were made with a view of purchase.

Then we believe that we have met the requirements of the law in this case, in that it clearly appears that the appellees failed to meet the burden on them to prove that Day had disclosed all material facts within his knowledge or possession from which Mrs. Cardoner could make a sound judgment as to value; that on the other hand, the affirmative testimony of appellees proves this was not done; and further, it is not claimed by appellees that it was done, but it is claimed by them that it would have been unreasonable to have expected

Day to furnish such facts. (Appellees' brief No. 2, p. 45.)

We call the court's attention to the case of Ledington v. Patten, decided by the Supreme Court of Wisconsin and reported in 86 N. W. p. 571, for a full discussion of this question. At page 580 the court said:

> "The policy of the law is to regard all transactions of a contract nature, between a trustee and his *cestui que trust*, whereby the former obtains the interest of the latter, or some part thereof, in the subject of the trust, as presumptively fraudulent and void at the election of the latter. If such a transaction be permitted to stand, it is upon condition that the trustee satisfies the court, fully and completely, that the *cestui que trust* received a full equivalent for that which he parted with and that the transaction was to his advantage. The burden of proof in such a case rests upon the trustee to clearly free himself from the imputation of fraud arising from the facts, and the same is true where a person deals to his own advantage with a person with whom he sustains relations of trust and confidence. The obligation of disclosure, and to protect the interests of the weak or trusting, is the same in one case as in the other. 'It is the language of all the authorities that such a transaction is always scrutinized in a court of equity with a watchful eye, and will not be sustained to the disadvantage of the *cestui que trust* except upon the most complete and satisfactory evidence of good faith and fair dealing on the part of the trustee.' (Puzey v. Senier, 9 Wis. 376."

Also, at page 581, the court said:

> "The trustee must show, 'by unimpeachable and convincing evidence, that the beneficiary, being *sui juris*, had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge and information concerning the property possessed by himself or which he might, with reasonable diligence, have possessed.' 2 Pom. Eq. Ju., sec. 958. 'A trustee may buy from the *cestui que* trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, providing that the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee,'—that the trustee took no advantage whatever of his situation, and that he gave his *cestui que trust* all the information which he possessed. Lord Elden in Coles v. Trecothick, 9 Ves. 247."

In the case of Brown v. Jones, 159 Fed. 321, the Circuit Court of Appeals for the Eighth Circuit had a like matter before it, and among other matters stated:

> "The first question is, was Byrne entitled to a specific performance of his contract of purchase of March, 1905? for an affirmative answer to that question avoids all others. The answer to it is conditioned by the relation of the parties to

each other under the contract of 1892, and by the nature of the disclosure which Byrne made to Jones of the management, condition, and value of the property before that contract was made. For wise reasons of public policy, the law peremptorily forbids everyone who, in a fiduciary relation, has acquired information concerning, or interest in, the property or the business of his correlate, to use that knowledge or interest or to take advantage of his correlate's ignorance in the matter, to the detriment of the latter, or for his own benefit. Trice v. Comstock, 57 C. C. A. 646, 649, 121 Fed. 620, 623, and cases there cited. A trustee or an agent may purchase the trust property directly from his *cestui que trust, sui juris,* or principal, on condition that the latter intends that the former shall buy, that the former discloses to the latter, before the contract is made, every fact he has learned in his fiduciary relation which is material to the sale, that he exercises the utmost good faith, that no advantage is taken by misrepresentation, concealment of, or omission to disclose, important information gained as trustee or agent, and that the entire transaction is fair and open. Michoud v. Girod, 4 How. 555, 11 L. ed. 1076; Brown v. Cowell, 116 Mass. 461, 465; Mills v. Mills (C. C.), 63 Fed. 511; Steinbeck v. Bon Homme Mining Co., 81 C. C. A. 441, 447, 152 Fed. 333, 339. But the condition is inexorable. Any omission by the trustee or agent to disclose any fact material to the sale learned by him as trustee or agent, any material misrepresentation, concealment, or other disregard of this condition, renders the sale and the contract for it voidable at the election of the *cestui que trust* or principal. Beach on Trusts and Trustees, sec. 518; Saunders

v. Richard, 35 Fla. 28, 16 South. 679; Cornish v. Johns, 74 Ark. 231, 240, 85 S. W. 764; Thweatt v. Freeman, 73 Ark. 575, 580, 84 S. W. 720; Coles v. Trecothick, 9 Vesev Jr., 234, 246; 2 Pomeroy's Equity Jurisprudence, sec. 958."

In the case of Gilbert and O'Callaghan v. Anderson, 66 Atl. 926, the Chancery Court of New Jersey said:

"Complainants and defendant bore to each other a trust relationship as partners, and, when defendant purchased the interest of complainants in the partnership business, it was his duty as a partner and manager of the business purchased to make a full and complete disclosure of the condition of the business in every way essential to an adequate knowledge on the part of complainants as to what they were selling; and the burden is upon the defendant to establish the fact that he performed his duty in that respect."

In the case of Nelson v. Matsch, decided by the Supreme Court of Utah and reported in 110 Pac. 865, and Ann. Cas. 1812 D. 1242, the court says:

"One of the fundamental principles of the law of partnership is that partners stand in a fiduciary relation to each other, and that it is the duty of each partner to observe the utmost good faith towards his copartners in all dealings and transactions that come within the scope of the partnership business. 22 Am. & Eng. Ency. Law 114, and cases cited. And, where one partner by false representations obtains an undue advantage over a copartner in transactions connected with the partnership business, equity will grant the defrauded party relief. 'Partners occupy a relation

of trust and confidence within the meaning of the rule, and in dealing with each other each is bound to disclose all material facts known to him and not known to the other.' 14 Am. & Eng. Ency. Law 70. The rule is well stated in Story on Partnership (7th ed.), sec. 172, in the following language: 'Good faith not only requires that every partner should not make any false misrepresentations to his partners, but also that he should abstain from all concealments which may be injurious to the partnership business. If, therefore, any partner is guilty of any such concealment and derives a private benefit therefrom, he will be compelled in equity to account therefor to the partnership.' So in Parsons on Partnership (4th ed.), sec. 151, it is said: 'From the requirement of perfect good faith, it follows that no partner must deceive his copartners, for his benefit and their injury, either by false representations or by concealments. Thus, if he persuades them into any course of business, or to any single transaction, by these means, and losses occur, he must sustain them or compensate for them. So, if he proposes to buy of them the whole or any part of their share of their business, and by any false statement or prevarication, influences them to enter into an arrangement to effect his wishes, it will not be obligatory on them.' In Smith on Fraud, sec. 114, the author says: 'Where a confidential relation exists and there is any misrepresentation, or concealment of a material fact, or any just suspicion of artifice, or undue influence, courts of equity will interfere and pronounce the transaction void, and, as far as possible, restore the parties to their original rights.' To the same effect are the following authorities:

Lindley on Partnership (2 Am. ed.), sec. 486; Pomeroy v. Benton, 57 Mo. 531; Goldsmith v. Koopman, 152 Fed. 173, 81 C. C. A. 465; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463."

In McAlpine v. Millen, 104 Minnesota, 289, 300, the court said:

"In dealing with each other, partners occupy a position of trust, and must exercise the most scrupulous good faith towards each other."

The Supreme Court of the United States, in the case of Michoud v. Girod, 4 Howard 502 to 566, largely determined the rights of a fiduciary or trustee to purchase the property of a beneficiary, and this case has been approved by the same court, as well as by many other courts, and cited in a vast number of cases, as will be seen by reference to 3rd Roses's Notes, Revised Edition, pages 1090 to 1101, the latest cases approving this decision being Magruder v. Druder, 235 U. S. 120, and United States v. Carter, 217 U. S. 308; Lane v. Cotton Mills, 232 Fed. 422; and many cases from both federal and state courts.

This case so fully and completely sets out the doctrine that we contend for that we quote from it largely, although on account of its great length we can only quote a little of the matter in point. This was a case of the purchase of property by an executor. The court held that such purchases are absolutely void, and not voidable, as held by Judge Deitrich in the present case. We quote as follows, pages 555, 556 and 557:

"It is also affirmed, in Church v. Marine Insurance Company, 1 Mason 341, that an agent or trustee cannot, directly or indirectly, become the purchaser of the trust property which is confided to his care. We scarcely need add, that a purchase by a trustee of his *cestui que trust, sui juris*, provided it is deliberately agreed or understood between them that the relation shall be considered as dissolved, 'and there is a clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee,' will be sustained in a court of equity. But it is difficult to make out such a case, where the exception is taken, especially when there is any inadequacy of price, or any inequality in the bargain. Coles v. Trecothick, 9 Ves. 246; Fox v. Mackreth, 2 Bro. Ch. 400; Gibson v. Jeyes, 6 Ves. 277; Whichcote v. Lawrence, 3 Id. 740; Campbell v. Walker, 5 Id. 678; Aycliffe v. Murray, 2 Atk. 59. And therefore, if a trustee, though strictly honest, should buy for himself an estate from his *cestui que trust*. and then should sell it for more, according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not be permitted to sell to or for himself. 1 Story Com. on Equity 2d ed.), 317; Fox v. Mackreth, 2 Bro. Ch. 400; S. C., 2 Cox Ch. 320, 327.

"In New York there has been no relaxation of it, since the decision in the case of Davoue v.

Fanning, 2 Johns (N. Y.) Ch. 252. It is a critical and able review of the doctrine, as it has been applied by the English courts of chancery from an early day, and has been received, with very few exceptions, by our state chancery courts, as altogether putting the rule upon its proper footing. Indeed, it is not too much to say, that it has secured the triumph of the rule over all qualifications and relaxations of it in the United States, to the same extent that had been achieved for it in England by that great chancellor, Lord Elden. Davoue v. Fanning was the case of an executor for whose wife a purchase had been made by one Hedden, at public auction, *bona fide*, for a fair price, of a part of the estate which Fanning administered, and the prayer of the bill was, that the purchase might be set aside, and the premises resold. The case was examined with a special reference to the right of an executor to buy any part of the estate of his testator. And it was affirmed, and we think rightly, that if a trustee, or person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestui que trusts* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale, under the direction of the court. And it makes no difference in the application of the rule, that a sale was at public auction, *bona fide*, and for a fair price, and that the executor did not purchase for himself, but that a third person, by previous arrangement with the executor, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestui que trust*, and who had an interest in the land under the will of the testator. The

inquiry, in such a case, is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestui que trust*, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. We are aware that cases may be found, in the reports of some of the chancery courts in the United States, in which it has been held that an executor may purchase, if it be without fraud, any property of his testator, at open and public sale, for a fair price, and that such purchase is only voidable, and not void, as we hold it to be. But with all due respect for the learned judges who have so decided, we say that an executor or administrator is, in equity, a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well-considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price. without fraud, at a public sale. Why should the rule be relaxed in the case of persons most frequently exposed to the temptations of self-interest, who may yield to it more readily than any others, with a larger impunity, if the day of equitable retribution shall ever come for those who have been defrauded? Is it not better that the cause of the evil shall be prohibited, than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact? Is the rule to be relaxed, in the case of executors, in respect to all persons in-

terested in the estate, or only to such of them as are *sui juris?* And if only to those who are *sui juris*, why in case of an executor as to such persons, when the rule has never been relaxed by any court of equity to permit purchases by any other trustee or agent of one who is *sui juris?* Shall it be relaxed in cases of those who are interested in the estate, and who are not *sui juris* or minors? Then other remedies must be devised to protect their interests than that which experience has shown to be alone efficacious. It is, that when a trustee for one not *sui juris* sees that it is absolutely necessary that the estate must be sold, and he is ready to give more for it than any one else, that a bill should be filed, and he should apply to the court by motion, to let him be a purchaser. This is the only way he can protect himself. There are cases in which the court will permit it. Campbell v. Walker, 5 Ves. 478; 13 *Id.* 601; 1 Ball & B. 418."

Lindley on Partnership, eighth edition, at page 364 says:

> "If one partner knows more about the state of the partnership accounts than another, and, concealing what he knows, enters into an agreement with that other, relative to some matter as to which a knowledge of the state of the accounts is material, such agreement will not be allowed to stand."

The matter is well treated in Volume 2, Pomeroy's Equity Jurisprudence, in sections 955 to 959, inclusive, to which we call the court's attention, and from which we quote in part as follows:

"Sec. 956. It was shown in the preceding section that if one person is placed in such a fiduciary relation towards another that the duty rests upon him to disclose, and he intentionally conceals a material fact with the purpose of inducing the other to enter into an agreement, such concealment is an actual fraud, and the agreement is voidable without the aid of any presumption. We are now to view fiduciary relations under an entirely different aspect; there is no intentional concealment, no misrepresentation, no actual fraud. The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption. * * *"

"Sec. 957. There are two classes of cases to be considered, which are somewhat different in their external forms, and are governed by different special rules, and which still depend upon the single general principle. The first class includes all those instances in which the two parties consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance, or contract or gift. To such cases the principle literally and directly applies. The transaction is not necessarily voidable, it may

be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action. * * *"

"Sec. 958. * * * In the second place, where the trustee deals, with respect to the trust, directly with his beneficiary: A purchase by a trustee from his *cestui que trust*, even for a fair price and without any undue advantage, or any other transaction between them by which the trustee obtains a benefit, is generally voidable, and will be set aside on behalf of the beneficiary; it is at least *prima facie* voidable upon the mere facts thus stated. There is, however, no imperative rule of equity that a transaction between the parties is necessarily, in every instance, voidable. It is possible for the trustee to overcome the presumption of invalidity. If the trustee can show, by unimpeachable and convincing evidence, that the beneficiary, being *sui juris,* had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by himself, or which he might, with reasonable diligence, have possessed, and that he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity. * * *"

There is some question raised as to whether or not Eugene R. Day was required to disclose to Mrs. Cardoner information he did not obtain as manager of the mine. In the first place, he had been manager of the mine for many years and lived in that community and it would have been hard to have determined what information he obtained as such manager and what not. Referring to the case of Brooks v. Martin, 69 U. S. 70, and to the case of Dongan v. McPherson A. C. 197, it will be seen that it is immaterial from what source he obtained his information if he actually had the information or material information in the premises it was his duty to disclose it, otherwise he would not be acting in the utmost good faith.

We then call the court's attention to 1 Perry on Trusts, section 194, which we quote in full, as follows:

> "Sec. 194. 'Lord Hardwicke's 'third species of fraud may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that fraud must be proved, not presumed.' At law, fraud must be proved; but in equity there are certain rules prohibiting parties bearing certain relations to each other from contracting between themselves; and if parties bearing such relations enter into contracts with each other, courts of equity presume them to be fraudulent, and convert the fraudulent party into a trustee. And herein courts of equity go further than courts of law, and presume fraud in cases where a court of law would require it to be proved; that is, if parties within the prohibited relations or conditions contract between themselves, courts of equity will avoid the

contract altogether, without proof, or they will throw upon the party standing in this position of trust, confidence, and influence, the burden of proving the entire fairness of the transaction. Thus, if a parent buys property of his child, a guardian of his ward, a trustee of his *cestui que trust,* an attorney of his client, or an agent of his principal, equity will either avoid the contract altogether, without proof or it will throw the burden of proving the fairness of the transaction upon the purchaser; and, if the proof fails, the contract will be avoided, or the purchaser will be construed to be a trustee at the election of the other party. The ground of this rule is, that the danger of allowing persons holding such relations of trust and influence with others to deal with them is so great that the presumption ought to be against the transaction, and the person holding the trust or influence ought to be required to vindicate it from all fraud, or to continue to hold the property in trust for the benefit of the ward, *cestui que trust,* or other person holding a similar relation."

We further call the court's attention to section 178 of the same book and quote as follows:

"If a person standing in a special relation of trust and confidence to another has information concerning property, and contracts with the other, and does not disclose his exclusive knowledge, the contract may be avoided, or he may be held as a constructive trustee. * * *"

Also, we refer to section 195, at page 318 of the same book, and quote as follows:

"* * * But there are exceptions to the rule, and a trustee may buy from the *cestui que* trust,

provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. The trustee must clear the transaction of every shadow of suspicion, and if he is an attorney he must show that he gave his client, who sold to him, full information and disinterested advice. Lord Eldon said he admitted that the exception was a difficult case to make out. And it may be said generally that it is difficult to find a case where such a transaction has been sustained. Any withholding of information, or ignorance of the facts or of his rights on the part of the *cestui*, or any inadequacy of price, will make such a purchaser a constructive trustee. * * *"

We quote as follows from Rowley on Partnership, Vol. 1, section 341:

"Owing to the peculiarly confidential and hazardous nature of partnership, one of the first and most essential rights of each partner is that his copartners exercise the greatest good faith in all partnership matters. * * *"

Also from section 342:

"The partnership relation is one of trust and confidence, and the members of a firm sustain a trust relation toward each other with reference to partnership matters. Partnership is 'eminently a relation of trust. * * * There is no stronger fiduciary relation known to the law than that of a copartnership, where one man's property and prop-

erty rights are subject to a large extent to the control and administration of another. * * *"

We quote section 403 as follows:

"Should one partner die the responsibility devolves upon the survivor of exercising an equal or even greater diligence and honesty in relation to the property, owing to the close relations and good faith supposed to exist between them while associated together. Practically all the duties owing by one partner to another during the life of both continue after the death of the other partner, excepting those which are personal in nature, and there are many added duties devolving upon the surviving partner. This question will be discussed at length in a subsequent chapter."

IV.

Some question has been raised as to the relation between Harry Allen and Mrs. Cardoner. The record shows [see testimony of Allen, p. 600] that he became connected with this matter solely upon a statement made by Mrs. Cardoner to him to the effect that she would like for him to sell her property and wondered if Eugene R. Day would buy it and he volunteered to see Day. These are the only instructions he received from Mrs. Cardoner. He was not advised by her to offer the property to any one else and statements that she had anything to do with threats to sell to any other person made by Allen, which Day did not take seriously [Record p. 795], were not even known to her. But however this may be it was held in the case of Taylor v. Ford, 131 Cal. 440, that the threat of a

partner to sell his interest to a stranger was not coercion in law.

V.

The next proposition is to determine whether or not Mrs. Cardoner received a price that approximated near the value of this property. The testimony with reference to the value of the Hercules partnership property may be classified as follows:

1. Estimates of value by persons interested in the property, options given ten and eleven years before the sale and the fact that the one-sixteenth interest was sold for $250,000 eight or ten years before;

2. The previous history of the mine, including its net and gross incomes, the income it was making at the time of the sale and immediately before, together with the estimated life of the mine;

3. The testimony as to the mineral content made by experts with the estimated length of time it would require for extraction and the probable net profits returned;

4. To any estimate made as above must be added the value of certain properties owned by the company, the cash on hand and the value of ore extracted from the mine and sold, for which returns were subsequently received.

The lower court based his opinion largely upon the testimony, which comes under the first classification.

The manner in which the court arrived at his conclusion that Mrs. Cardoner was paid a reasonable price

for the property, we believe shows beyond any doubt that he failed to grasp the proper viewpoint, notwithstanding the many interesting suggestions made by him which he insists entered into the value of this property. The trouble is that he failed to apply the law as laid down in Brooks v. Martin, Perry on Trusts, Elliott on Contracts, Pomeroy's Equity Jurisprudence, and cases heretofore quoted to the effect that the burden of proof was upon the appellees to establish that the transaction was fair and that a price approximating the real value was not only given, but that it was proven by appellees that Day gave such price, that the transaction was presumptively fraudulent; that appellees were burdened with proving not only those things, but such facts must be established by clear and convincing testimony. The court says:

"The ultimate question with which we are concerned, of course, is not how much ore there was in the mine but what the property was reasonably worth upon the market in cash, that it should have reasonably sold for under the circumstances."

The court goes into an elaborate argument as to the uncertainties of mining, cost of extracting, treating and marketing, uncertainties of price at which the property would have sold, uncertainties of the estimates of the present worth of the ores in the earth, how long it will take to market and turn into cash, the effect of the war upon the mining industry, and whether or not this country would enter the war and what effect that would have. In other words, he surrounded the mining properties with a cloud of uncer-

tainties and speculative conditions from which he concluded that the price given approximated near its worth. Had this mining property all the speculative conditions and uncertainties attached to it mentioned by Judge Dietrich in his opinion, how would it be possible for him to determine whether or not the appellant had received near its value when she sold it? From his premises, there could be but one conclusion reached, and that conclusion would be to the effect that there was no testimony in this case upon which the court could base or determine the value of the mine, and there being no reliable evidence of value and the burden of proof being upon the appellees, decree should be entered against them.

It is instructive to read the reasoning by which the court arrived at the conclusion that a fair price had been paid for the property. We copy from his opinion [Record pp. 1389-1391] as follows:

"In view of these admitted uncertainties and the wide variance between the estimates of the experts, manifestly no safe conclusion as to the reasonable value of the property in October, 1916, can be predicated upon their testimony alone, and therefore I refrain from setting forth an analysis of it. It is of weight and value in connection with the other evidence upon the subject, and I give it consideration in that connection. What, in the main, is the other evidence? Day, though not an expert geologist or mining engineer, and perhaps without experience in marketing mines, was an intelligent, practical operator, with intimate knowledge of the general condition in and about this property. His judgment is entitled to some weight,

and I am satisfied that he would not have given more for the plaintiff's interest. Some point is made that he bargained with her and sought to secure the property for a much lower figure. But it is not material to the present inquiry to determine whether or not he had the right to deal with her as an equal, if it be assumed that she had all the information that he possessed. It might very well be held that if she knew as much about the mine as he, he had the right to buy her interest at such price as she was willing to take. But be that as it may, whether we condemn or justify his conduct in seeking to get the property for less than he finally paid for it, the fact is that he added to his first offers until he reached the sum of $312,500, exclusive of the cash on hand, or a price upon the basis of $5,000,000.00 for the assets, exclusive of the cash on hand, and there declined to go further. Through Allen the plaintiff sought to get him to increase his bid, but Day definitely declined, and I think was unwilling to pay more. His testimony now as to what he considers the property worth, as well as that of his brothers, Harry L. Day and Jerome J. Day, is in the nature of expert testimony, and, coming from an interested source, is, of course, to be considered in the light of such interest. But if for that reason we put aside entirely their opinion testimony, and impute to that of the opposing engineers equal weight, what have we? We have Day's decision at the time not to pay more. We have the testimony of the two disinterested witnesses Paulsen and Hutton, the one that the property was worth no more than was paid, and the other that it was worth less. We have no instance where a larger price was ever paid or offered for any interest in the property. We have the sale of the Reeves one-sixteenth interest seven or eight years before, when undoubtedly the

actual value was greater than in 1916, for $250,000. We have the unaccepted offers of the owners to sell the whole property in 1905 for $4,000,000 and in 1906 for $6,000,000. If it be said that to Day the interest had a special value because it gave 'the Days' control of the mine, the obvious reply is that to an independent investor, generally speaking, so small an interest would be less saleable, and that therefore its market value, when offered alone, could hardly be said to be equal to one-sixteenth of the market value of the property as a whole. Upon consideration of the entire matter, my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, and in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required."

The court substantially finds the value of the mine from the testimony of Hutton and Paulsen, part owners, who merely made an estimate of what it was worth in round figures, that a like fractional interest had been sold eight or ten years before for $250,000; and upon the fact that in 1906 an option had been given for six million dollars, and in 1905 an option had been given for four million dollars. In other words, the expert testimony of Burbridge and Greenough was never analyzed by the court; and this with the past history of the mine, its valuable accessory property, tremendous income, future possibilities and probabilities, large cash reserve and ore in transit and sold, not referred to by the court, was the only real testimony

from which any determination could have been made as to the value of this mine. We have endeavored in our original brief to show that the Greenough estimate based upon calculations that were sound, were approximately near the value of the mine, and that the Burbidge estimate, if he had taken the proper values of ore, would have been almost identical with that of Greenough.

Considering the law of this case to the effect that the burden of proof was upon the appellees, and certainly in estimating the value the testimony should be taken most strongly against them, and if there was any fraud, *or if it was not clearly shown that the value of the mine approximated near what Mrs. Cardoner received therefor, the decree should be reversed.*

As will be seen by reference to the foregoing quotation from the court's opinion, the evidence of witnesses as to past history, dividends and past production, large income for 1916 and 1917, value of other property connected with the Hercules and owned by the company, the Northport Smelter, Pennsylvania Refinery, equipment and mill and other permanent and recently made improvements at a cost of over $2,000,000, nearly $400,000 cash, and $1,048,864 ore sold and for which payment was thereafter made, etc., and many other elements of value hereinafter referred to were lightly considered by the court in determining value and these principally for the purpose of showing the speculative and uncertain character of such evidence. Likewise the testimony of the expert engineers was disposed of with, "Such estimate of course is only one of the im-

portant factors and when we consider all of them we find that the margin of uncertainty is so great that any opinion of the value must be necessarily speculative." Then further on in his opinion [p. 1398]:

"In view of these admitted uncertainties and the wide variance between the estimate of the experts manifestly no safe conclusion as to the reasonable value of the property in October, 1916, can be predicated on their testimony alone and, therefore, I refrain from setting forth an analysis of it. It is of value and weight in connection with the other evidence upon the subject, and I give it consideration in that connection."

The court then considered, in his opinion, the other evidence as follows:

(a) The fact that Eugene Day refused to pay more than $312,500.00 for the one-sixteenth interest.

(b) The opinion of the Day brothers and their partners, Paulsen and Hutton, to the effect that the amount paid Mrs. Cardoner was approximately the value of the mine.

(c) The fact that a sale of the one-sixteenth interest in the mine was made seven or eight years before for $250,000.00 by a man named Reeves.

(d) That certain options were given by the owners of the mine in 1905 and 1906 unaccepted, for $4,000,000 and $6,000,000 respectively.

The court did not attempt to analyze the past history of the mine, the present conditions, nor the estimate of experts; had he done so, he would have found that all three were capable of being surprisingly reconciled

and to force a conclusion of a value of approximately $10,000,000.00.

In our opinion, the lower court, able judge that he is, was led into error by treating this transaction as though the burden of proof was not upon the appellees to show by clear and convincing testimony that all necessary disclosures had been made and that a fair price had been given, but that he rather treated it in effect as an ordinary suit for rescission, based upon false representations, not involving fiduciary relations.

Had he analyzed or seriously considered the testimony as to value under our classifications 2 and 3 he must have reached a different conclusion. Let us analyze the estimates of value upon which the court based his decision:

First, the testimony of Hutton, the partner of Day, who testified that the value was approximately $4,000,000 and that he so told Mrs. Cardoner in the summer or fall of 1916. [Record p. 672.]

Counsel for appellees in their brief number three, at page 94 said that Mrs. Cardoner admitted having seen Mr. Hutton on October 29th, 1916. This is entirely erroneous, as will be seen from her testimony [Record pp. 404-8], where she denies having seen Hutton at any time subsequent to May. It would have made no difference, however, as her interest had been sold prior to October 29th. Hutton based his testimony on the estimated depth of ore of 500 to 700 or 800 feet below the Hummingbird Tunnel (it was 535 feet at the time he testified). [Record p. 678.] This very fact destroys all value of his testimony. No expert witnesses

of the appellees estimated the future depth of the mine at less than 1800 or 1900 feet, below No. 5 level, from which no ore had been removed.

If the sums of the cash on hand (after deducting all debts) of $370,520.00, and value of the ore in transit of $1,048,868.14, equalling $1,371,388.14, was deducted from this $4,000,000 estimate, there would remain $2,628,611.86 as value for the ore in the mine and all other property belonging to said partnership; the latter had cost approximately $2,000,000. This was a less sum by $300,000 than the net income in 1916, and a still less sum than the income for 1917. The appellees' witnesses, Burbridge and Eugene R. Day [Record pp. 901-2], each in 1918, at the trial and at a time when they knew a great deal more about the mine, and after the shaft had been driven some 600 or more feet below the Hummingbird Tunnel, estimated the life of the mine at about ten years from October 28, 1916, and the depth of the ore at 1900 feet.

Second: The testimony of Mr. Paulsen [Record p. 686] to the effect, in his opinion, that the appellant received approximately the value of her interest, will be best answered by our own estimate taken from the testimony further on.

Third: The testimony to the effect that options were given in 1904 and 1905 for $4,000,000 and $6,000,000 respectively, and that about the same time the Reeves' one-sixteenth interest was sold for $250,000 and that no other like amount was offered for any interest, may be considered together. The fact that since said options and sales more than $10,000,000 net profits have

been taken from this mine and the value placed on the property at this sale was approximately equal to that of the options, is sufficient to show that this testimony was valueless in determining the present worth.

From an investor's standpoint it was not the same property, nor would any purchaser place the slightest probative value on such testimony. Proof of options given ten years before on an actively worked mine that had subsequently paid ten million dollars in dividends would certainly not establish value nor would it be reliable evidence in any sense of the word. This evidence was admitted over the objection of appellant and its admission was the basis of our first assignment of error.

Fourth: The fact that there was no instance wherein a larger price was paid for any interest in the mine is not significant, when the owners who testified on the subject said that their interests were not for sale; besides there is no evidence that any interest had been for sale since the Reeves interest was sold ten years prior.

Fifth: The three Day brothers testified that Mrs. Cardoner received all her property was worth. This must be considered along with the fact that they are interested parties and that no person buying or selling would have given any particular weight to such testimony in view of the figures that we shall hereafter present. To show what slight probative force the testimony of Eugene R. Day with reference to value should be given we call the court's attention to the fact that he testified that up to October 28, 1916, the

mine had paid $10,000,000. (In fact, it had paid $12,000,000. See appellees' brief number two, top of page 68; and this did not include ore in transit amounting to $1,048,648.14, altogether $13,000,000.) That he estimated the mine had been three-fifths worked out, leaving a remainder of two-fifths yet to be worked; that inasmuch as three-fifths had paid $10,000,000, the remaining two-fifths would pay $4,000,000. It is quite evident to any one that if three-fifths paid $10,000,000, two-fifths would pay $6,666,666. [Record pp. 753-4.]

Appellees' witness Burbridge estimated that the value of ore should be discounted at compound interest at six per cent for a period of four and seven-tenths years to establish the present value, and said amount so discounted is $4,995,268—to this add the ore in transit, $1,048,868; cash, less debts, of $370,521, and other property hereafter estimated at $2,014,528, and the total value would be $8,329,285.00. This is a fair deduction from Eugene R. Day's own testimony.

Our Estimates of Value Based on the Testimony.

(a) A person undertaking to purchase this property would probably first determine the value of such outside property as was more or less connected with the mine, the protecting property and new improvements made for future operations at and below the Hummingbird tunnel, the cost of which is as follows:

Real estate [Rec. p. 1365]	$14,500
Timber land [Rec. p. 1365]	4,250
Pennsylvania refinery [Rec. p. 93]	87,500
Wallace Mills [Rec. p. 93]	150,891

Dwellings [Rec. p. 94]	11,403
Accounts receivable [Rec. p. 94]	29,400
Northport smelter [Rec. p. 97]	288,289
Republic mine [Rec. p. 1367]	46,500
Mining stock [Rec. p. 93]	288,239
Lodes and patents [Rec. p. 1366]	30,929
Machinery and equipment [Rec. p. 93]	93,553
Hoist [Rec. p. 93]	29,065
No. 5 surface improvement [Rec. p. 94]	50,720
Wallace mill [Rec. p. 94]	150,891
Power line [Rec. p. 94]	26,180
Mine lighting plant [Rec. p. 1366]	25,116
No. 5 compressor [Rec. p. 1367]	6,484
No. 5 timbering [Rec. p. 1367]	120,016
No. 5 shaft [Rec. p. 1367]	65,057
Sawmill [Rec. p. 1366]	15,124
No. 5 level [Rec. p. 1366]	514,804
No. 5 picking plant [Rec. p. 1360]	30,022
Assay office [Rec. p. 1366]	4,311
No. 5 shaft [Rec. p. 1367]	31,246
Total	$2,014,532

These items were paid for out of the profits of the mining company and have nothing to do with the cost of previous mining (more than $8,000,000 had been expended and charged off for that purpose), but only contains net construction expenditures available for the future development of the mine.

It is not contended by us that at the end of the mining operations the cost of this property will be returned out of the sale thereof. This could not be. *But it is*

claimed that this property will not have to be duplicated; that it has been paid for out of the earnings of the mine; that the future earnings (it being assumed by Burbridge that the mine is only 52 per cent worked out) will be increased by approximately this amount, and whatever salvage there may be can be added for still greater dividends.

The foregoing property, that cost over two million dollars, paid for out of the gross earnings, is substantially all of such expenditures (except their maintenance) that will ever be needed [Greenough's testimony, Rec. p. 1096]. He states that the only additional cost of like improvements will be sinking the shaft, which would be about $100,000, if it would cost about in the same ratio as the first 535 feet, which was $31,246.

(b) The next property is cash on hand,

which was [Rec. p. 95]	$649,359
Less debts of [Rec. p. 95]	278,839
Would be	$370,521

(c) The next item of value would be the ore in transit of $1,048,864 [Rec. p. 95], which had been sold, was returning in cash every day, the last of which would be returned within ninety days [Rec. p. 783]. At most, this should be discounted at 6 per cent for forty-five days, said discount being $7,866,

leaving a balance of $1,041,999 as the present cash value of said ore.

The contention of appellees [see record, pp. 1110 to 1123] that it was necessary to have $600,000 cash on hand all the time and besides to have a million tons of ore in transit, and sufficient funds to keep it going, misled the court, as the record shows. [Rec. pp. 1121 *et seq.*]

The fact is, the company had on hand cash enough ($649,359) to put $2,000,000 worth of ore in transit. This is proven by the following tabulated statement of the business of the Hercules Company taken from the monthly statements introduced in evidence, to-wit:

Date	Cash on Hand	Dividends	Expense	Page Rec.
Aug., 1915,	$257,000	.....	$ 25,000	1166
Sept., 1915,	146,000	.....	82,000	1171
Oct., 1915,	158,000	$ 32,000	100,000	1144
Nov., 1915,	157,000	32,000	134,000	1191
Dec., 1915,	242,000	32,000	138,000	1199
Jan., 1916,	343,000	32,000	110,000	1153
Feb., 1916,	400,000	64,000	131,000	1136
Mar., 1916,	507,000	64,000	134,000	1209
Apr., 1916,	470,000	96,000	132,000	1319
May, 1916,	538,000	128,000	159,000	1329
June, 1916,	767,000	288,000	130,000	1337
July, 1916,	670,000	504,000	129,000	1345
Aug., 1916,	375,000	256,000	157,000	1353
Sept., 1916,	101,000	.....	83,000	1359
Monthly av.	365,714		118,143	

Monthly average expense for ten months, 1916, 130,555

The average cash on hand for the fourteen months previous to the sale was $365,714. On September 1, 1916, there was cash on hand, $101,000. The actual average expense of running the mine for the previous fourteen months was $118,143 a month, and had averaged $130,555 per month during the previous ten months of 1916, and was only $93,000 for the month of September before the sale. *Compare this table with the testimony of Mr. Ramstead, the company accountant.* [Rec. pp. 1121-2.]

It will thus be seen that the cost of putting ore in transit was approximately $130,000 a month, whereas the average monthly shipments of ore were $369,000 in 1916, showing a profit of nearly 70 per cent. Burbridge testified "they could get along with $200,000." [Rec. p. 1120.] They did "get along with $101,000" in September, 1916.

From the above it will be determined that the cash on hand was ample to care for all expenses and that the ore in transit was equivalent to cash.

VALUE OF PROPERTY EXCLUSIVE OF ORE IN MINE.

Property, etc.,	$2,014,532
Cash,	370,521
Ore in transit,	1,041,999
Total,	$3,426,052

(d) The next matter to be determined would be the probable value of the ore in the ground. In this, testimony of the expert witnesses is necessary. Greenough, the appellant's witness, testified that it would approximate 2,210,000 tons. Appellees make elaborate calculations to show that Greenough's estimate should be reduced to 1,812,722 2/9 tons. (Appellees' brief No. 3, p. 132.)

We will accommodate them further and accept the estimate of their own witness, Mr. Burbridge, at 1,575,600 tons. [Rec. p. 903.] This estimate, we believe to be too conservative, but under the considerations confronting us in this case we have determined to present the whole case from the evidence of appellees alone.

On October 28 the testimony shows the following facts:

The net profits from 1908 to 1912 averaged $3.27 per ton, while from 1913-1915, inclusive, the average was $7 per ton, although the average price of metals was less in the latter period and cost of labor and material greater. The expenditures so made upon the property as heretofore outlined would be justified in increased efficiency. The following tables will show the average price of lead and silver for many years previous to this sale:

MARKET VALUE OF SILVER AND LEAD.

	Lead, per Hundred	Silver, per Ounce, in Cents.
1901,	$4.36	
1902,	4.10	

1903,	4.26		
1904,	4.32	1904,	57.22
1905,	4.705	1905,	60.35
1906,	5.66	1906,	66.79
1907,	5.33	1907,	55.32

Period of Level Values:

1908,	4.236	1908,	52.86
1909,	4.30	1909,	51.50
1910,	4.35	1910,	53.49
1911,	4.46	1911,	53.40
1912,	4.485	1912,	60.83
1913,	4.40	1913,	59.79
1914,	3.87	1914,	54.81
1915,	4.675	1915,	49.685

1916,	6.83	1916,	65.66

The probable depth of the remaining ore was 1900 feet [Rec. p. 902]; that the ore bodies were found to be as expected at 200 and 410 feet, respectively, below the Hummingbird tunnel when cut by the shaft or drift [Rec. p. 839]; that the probable life of the mine as estimated by appellees' witness Burbridge was 9.4 years [Rec. p. 903]; that in 1916 the net profits were $9.40 per ton; that the net profits for the life of the mine averaged $7.29 per ton; that the net profits from 1908 to 1915 (a period of even prices) averaged $5.33 per ton; that the net profits from 1912-1915 (a period of low prices in metals, but with better mining facilities) averaged $7 per ton.

Basing estimates upon these several values as to mineral content and net profits, we arrive at the following estimated value of the mine:

1,575,600 tons of ore at $7 per ton equals $11,029,200, which, discounted at 6 per cent compound interest for 4.7 years Burbridge's theory [Rec. p. 904] would be	$8,240,039
To which add the value of other property,	3,427,039
Making a total of	$11,667,039

The above is based on years of lowest average metal value, but after equipment had been greatly improved (1913 to 1915, inclusive).

Valuing the net profits at $9.40 per ton, being the average profit of 1916, the result would be for ore in the ground, $16,506,400, which, discounted at 6 per cent compound interest for 4.7 years, would be $12,321,914. To which add the value of other property of $3,427,039, the total value would be $15,808,953.

Estimating the value of the ore at $5.33 per ton, being the average value of the years from 1908 to 1915, being that of low even value, the result would be $8,398,000, which, discounted at 6 per cent for 4.7 years, would be $6,270,000; to which add $3,427,039, other property, would be $9,697,039. By taking the valuations from 1908 to 1915, being that of the lowest average period, it seems that our estimated value of nearly $10,000,000 on this basis is reasonable, when it is considered that that basis was made upon the mineral content and the rate of discount and

term of years established by appellees' witness Burbridge; the only difference being it is based on net profits, treating 1908 to 1915 as "normal years" instead of 1908 to 1912, as Burbridge did.

The value of the Hercules mining property, based upon Burbridge's estimate of 1,575,600 tons of ore in place, valued from lowest to highest price of ore during the life of the mine, to which is added the value of other property owned by the company, the cash on hand, and the ore in transit discounted, is shown by the following figures:

Value of ore per ton	Estimated net value of ore after discounted 6% for 4.7 years	Value of property and improvements	Cash and value of ore in transit discounted	Estimated value of all properties
$3.00	$3,531,200	$2,014,532	$1,412,520	$7,957,252
5.33	6,270,000	2,014,532	1,412,520	9,696,052
7.00	8,240,000	2,014,532	1,412,520	11,667,039
7.29	8,435,300	2,014,533	1,412,520	11,861,052
9.40	12,321,914	2,014,532	1,412,520	15,808,953

The $3 per ton net is value placed on future production by Burbridge. [Rec. p. 904.]

The $5.33 is the average net profit per ton from 1908 to 1915, inclusive, period of level values of metals.

The $7 is average net profit per ton of 1913 to 1915, inclusive, the period of low price, but high efficiency.

The $7.29 is the average net profit per ton for the whole life of the mine prior to October 28, 1916.

The $9.40 is average net profit per ton for 1916, the period of highest prices.

There were many physical facts proven, contradicting estimates of value, made by the owners of the mine, which, we believe, clearly show that appellees did not meet the burden of proving that the consideration paid approximated reasonably near the value; and we refer the court to the following facts established by the evidence:

(1) The net profits to date of sale had been $11,915,886.74 [rec. p. 72], to which should be added $1,048,864.14 for ore sold and payment for which was later received [rec. p. 95], and profits of $272,676.66 made on the stock of the Selby Smelting and Lead Company [rec. p. 96]; cash on hand, $370,561; making a total net profit of $13,607,948.54, on October 28, 1916.

(2) That the great expense of purchasing protecting property, smelter, refinery, mill, power, other mines, approximating a million dollars (see page 58 of our original brief), would not have to be duplicated.

(3) That equipment, surface improvements, tunnels, shafts, power hoists, cars, lighting, timbering, tools, etc., that cost over a million dollars would not have to be duplicated, which would increase the percentage of profits for the future of the mine.

(4) There was a net profit of $2,368,682.90 earned to October 28, 1916, for that 10 months. [Rec. p. 77.]

(5) That the ore taken out during November and December, 1916, was approximately 23 per cent of the

amount taken out in the previous 10 months, which would make the net profits for 1916 approximately $3,000,000.

(6) The testimony shows that the year of 1917 was a more remunerative year than 1916, hence must have netted more than $3,000,000. [Rec. p. 854.]

(7) The net income for 1917, $3,000,000 or more, added to that for November and December, 1916, which was approximately $550,000, equalled about the value placed on the mine; or in other words, the Days had their money back within about 14 months after the purchase; the sale value being $5,000,000, less ore in transit valued at $1,048,864.14, or $3,950,135.85.

(8) Up to October 28, 1916, during the previous life of the Hercules, there had been mined 1,777,951 tons of ore, which was sold for $21,985,472.84 (including the $1,048,864.14, ore in transit), the gross average price per ton being $12.37.

(9) The estimated contents of the mine on October 28, 1916, as made by the defendants' expert witness, Burbridge, was 1,575,600 wet tons of crude ore, or equal to 48 per cent of the mine, and at the same average value of the previous 16 years would bring $19,490,172.

(10) There was ore shipped and not paid for (equal to cash) in 1916, to October 28, of $1,048,-864.14. [Rec. p. 95.]

(11) At the time of sale, metals were at the highest, with no immediate prospect of lower prices.

(12) The net profit for 1916 was 73¾ per cent of the value placed on the mine and all Hercules Com-

pany property, excepting only the cash on hand and ore in transit, sold and equivalent to cash.

(13) There was property, equipment and new improvements of a greater value than $2,000,000, paid for out of profits that would not have to be duplicated.

(14) Net profits for the future would be very much greater proportionately because large expenditures made would not have to be duplicated, and the mine was completely equipped — "One of the best equipped mines in the Couer d'Allene."

(15) The average mineral content of milling ore in 1916 was greater than for the previous life of the mine. That is, the lead content was 10.88 per cent and the average was 9.85 per cent for 16 years. The average silver content was 8.73 ounces per ton for 1916, and that of the previous 16 years was 8.60 ounces per ton.

(16) Excluding the high-grade ore mined and especially picked during the first five years, the ore has not become baser to a material extent, as claimed by appellees.

(17) The average tonnage per vertical foot to October 28, 1916, was 808. At that date the tonnage per vertical foot was estimated at 1400.

In the argument of the case we called special attention to the slight of hand performance with figures indulged in by witnesses for appellees, and referred to at pages 108 and 109 of appellees' brief No. 3, *whereby it was sought to reduce the value of the ore in transit*

amounting to $1,048,864, to the sum of approximately $177,000, it being stated in said brief that appellees' interest therein would be $11,111 1/9, this multiplied by 16 to give the full value of said ore is $177,884.

We are somewhat dazed in trying to understand just how this was brought about. We know the ore was of the value stated; we know that all operating expenses and cost of extraction had been paid for; we know that the mine was out of debt and had cash on hand; we know that the net profits in this ore amounted to nearly $700,000 (see tabulated statements, p. 102 appellant's original brief), and yet, like Caesar after death, it was reduced to this little measure. The problem is left for the court to solve.

It is such argument as the above that has reduced the value of this mine from more than ten million dollars to that of from two and a half to four million dollars, contended for by the appellees.

How Appellees' Witnesses Reduced Value.

First. The cash on hand, about $650,000, was discounted at 6 per cent for 4.7 years. [Rec. p. . . .]

Second. The $1,048,864, ore in transit, was treated by a process of reduction that brought it down first to $400,000, and then to $177,000. (Appellees' brief No. 3, pp. 108-9.)

Third. The value of the estimated ore in the mine was placed at $3 net profit per ton; when the average for 16 years has been $7.29. The average for 1916 was $9.40; the average for the period of level (so-called

normal) prices, 1908 to 1915, was $5.33; and the average for the years 1913 to 1915, the years of low level prices of metal, and when mining facilities had reached a high standard, was $7 per ton.

Fourth. The ignoring of $2,000,000 invested in property out of the earnings that would not have to be duplicated.

By the above methods—none of which bears the light of reason—the appellees managed to estimate the value of the property at approximately what Mrs. Cardoner received, or less.

There is nothing reasonable or fair in such estimates. It is our judgment that the net profits should be valued at the average value of the previous life of the mine. Certainly metals were at the highest price known for years at the time the trade was made, with every prospect of a long continuance of such values.

Conditions October 28, 1916.

The court in his opinion stated that we would be bound by conditions as they appeared October 28, 1916, which is correct; and these are the conditions, partly:

(1) The mine was approximately 52 per cent worked out.

(2) It had earned over $13,000,000.

(3) It had earned $2,368,682 net, in 1916 to October 28.

(4) The gross output had sold for over $21,000,000.

(5) It was one of the best equipped mines in the country.

(6) Its incidental property, equipment and development at No. 5 level had cost $2,000,000.

(7) It had cash on hand, less debts, of $370,000.

(8) It had ore in transit of $1,049,000.

(9) Prices of lead and silver were high, and silver going up all the time.

(10) A great war was raging, causing high prices.

(11) The average net profit in 1916 was $9.40 per ton; for the life of the mine, $7.29; for the period of level prices, from 1908 to 1915, $5.33 per ton.

(12) No interest had been sold or option given since 1906, since which time the mine had made net profits of about $10,000,000.

(13) There was no apparent change in productiveness on that date.

(14) The net profits were at said date about 70 per cent of the gross income.

(15) It would reasonably appear that future net profits would be greater on account of splendid equipment and facilities.

(16) Ore at 410 feet below No. 5 level had been cut through, and was all that ever was expected—was "good ore," likewise at 200 level.

With the above conditions apparent October 28, 1916, could it be said that the value was not greatly in excess of the price given?

With special attention to the fact that we are basing our estimates of value on Burbridge's testimony (except as to the probable future value of metals, which

is not a matter of expert testimony), and including value of property he ignored; that the mine was paying over $3,000,000 net annually at the date of sale; that prices of metals were at the highest; that there had been no material loss in mineral content; that the Days probably got their money back in 14 months; that the estimated life of the mine was 9.4 years; that the evidence shows unfair methods used to estimate value by appellees; that only 52 per cent of the mineral content had been removed; that the estimated value, less ore in transit, was less than $4,000,000—and many other facts referred to in this brief, we confidently believe that we have presented a case clearly showing that the appellees did not meet the burden of proof and introduce evidence from which the court was justified in holding that the price paid for Mrs. Cardoner's interest in the mine and property approximated reasonably near its value.

We believe that it is not possible to say that the appellees have proven the mine to be worth less than $10,000,000. We further believe that by a fair preponderance of the testimony we have shown the value of the Hercules Company's property to be worth over $10,000,000.

(We have added at the end of this brief under the heading, "Statistics and Estimates Deduced from the Evidence," certain information compiled from the evidence and referred to at various parts of this brief. It is believed this will be of convenience to the court.)

VI.

Purchased by Eugene Day While Executor of Damian Cardoner's Estate.

Eugene R. Day purchased said property while executor of the estate of Damian Cardoner. We call the court's attention to the case of Michand v. Girod, 4 Howard pp. 502-566, quoted from under a previous heading in this brief. This case holds that an executor cannot purchase property of his trust unless authority be given by order of court duly entered; and states:

> "And it makes no difference in the application of the rule that the sale was at public auction, *bona fide* and for a fair price; and that the executor did not purchase for himself but that a third person by previous arrangements with the executor became the purchaser to hold in trust for the separate use and benefit of the wife of the executor. * * * The inquiry in such a case is not whether there was or not fraud in fact. The purchase is void and will be set aside at the instance of the *cestui que* trust."

The mere fact that the property had been delivered to Mrs. Cardoner by Day, the executor, under an order of distribution would not give him any the less the advantage. It is our belief that both the general law as quoted in the case just mentioned (see more complete quotation in another place in this brief) and the statutes of Idaho contemplated that an executor should be removed from such temptation as came to Eugene R. Day; and that such transactions between an executor and heir are and ought to be held absolutely void.

We see no reason why he should be permitted to reap all the advantage of his knowledge and position as executor by distributing the property and then immediately buying it. The opportunity to overreach and defraud would be equal in either case. The purchase of Day, while executor, should avoid this sale.

VII.

Conclusion.

We believe that it is clearly shown appellees did not meet the burden of proving that Eugene R. Day disclosed all the information in his possession that the law required him to disclose in purchasing Mrs. Cardoner's property, so that she could have formed a sound judgment as to the value of the property so sold to him.

We believe it is further clearly shown that appellees did not meet the burden of proving that the price paid for the Hercules property by Eugene R. Day to Mrs. Cardoner approximated reasonably near its value; but on the other hand that the evidence shows the price paid was grossly inadequate.

It is further clearly shown that Eugene R. Day bought said property from Mrs. Cardoner (placed it in his sister's name, ostensibly to deliver to himself and others later) while he was executor of the estate of Damian Cardoner, deceased. Such property was a part of said estate and had been distributed only a few days before, and such sale, in our opinion, should be held to be void.

For these and others reasons stated in this brief, and in our original brief, it is respectfully submitted that this case should be reversed and rendered for appellant; or else should be reversed and a new hearing ordered.

Etienne de P. Bujac,
Carlsbad, N. M.
Charles R. Brice,
Roswell, N. M.,
Solicitors for Appellants.

(See compilations and tabulations of facts following this.)

SUPPLEMENTAL.

Pages 131, 132 and 135 to 138 inclusive of appellee's brief No. 3, were reprinted and substituted after filing. While copies of the substituted pages had been delivered to solicitors for appellant, they were not before them at the time their reply brief was written, which was hurriedly done.

FURTHER "PROCESSES OF REDUCTION."

At the original page 132 appellees had reduced Greenough's estimate of tonnage only a matter of half million tons to 1,812,122 tons (too large for practical purposes). So in the substituted page the "process" is continued, and the tonnage is further reduced to 1,326,722; about a million tons below Greenough's estimate and 350,000 tons below Burbidge's estimate.

At pages 135 to 138 certain arbitrary problems are worked out by a sort of inverted "reduction process," by using $5,000,000 as purchasing capital and calculating interest upon it at arbitrary rates and time.

ERRORS.

1. The interest should be figured at 6%, the legal rate. The mere fact that Greenough estimated the profit in a mining venture should be high, would not effect intrinsic value. (Burbidge's testimony, Rec. p. 932.)

2. The time, 13.75, 12 and 10 years is practical-

ly and theoretically wrong and opposed to the evidence. Greenough's final estimate for the life of the mine was 7.7 years. (Rec. p. 1100.)

3. The computations are made on the theory that no returns of any kind will be made until the end of the life of the mine, when in fact the returns would be greatest at the beginning and lessen gradually to depletion, resulting in greatest returns in the first years. Thus 261,968 tons was mined in the first 10 months of 1916, at which rate the tonnage (1,575,600 Burbidge estimate) would be mined out in 5 years, though Burbidge estimates it at 9.4 years. The principal should be credited with each year's returns and thus reduced; or the time reduced by adopting the time it will be assumed one-half will be returned. Practically this would be sooner than one half the life of the mine, but Burbidge assumed this and we followed in our brief. (Rec. p. 906-7.) The time possibly should be near one-third the estimated life of the mine.

Upon the Burbidge theory these calculations should have been based on a time of one-half 7.7 years (Rec. p. 1100) which would be 3.85 years, and not 13.75, 12, or 10 years.

MORE REDUCTION PROCESS.

At pages 140-1, two problems are based on "dividends," when it should be on "net profits"; on $400,000 value of ore in transit, when it should be $1,048,868; on assumption that ore at the apex

equalled in volume ore at the No. 5 level, which is not true.

GREENOUGH ESTIMATE.

Greenough's estimate fairly analyzed would result as follows:

Ore in mine, $10,750,000 (Rec. p. 1059), discounted at 6% for 3.85 years (half of 7.7 years) would be	$ 8,644,662.
Ore in transit	1,048,868
Cash less debts	370,000
Incidental property, and improvements at No. 5 level	2,014,533
Total value	$12,078,063

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Solicitors for Appellant.

ADDENDUM.

Statistics and Estimates Deduced from the Evidence.

Cost of Incidental Properties and New Improvements.

Real estate [Rec. p. 1365]	$14,500
Timber land [Rec. p. 1365]	4,250
Pennsylvania refinery [Rec. p. 93]	87,500
Wallace mills [Rec. p. 93]	150,891
Dwellings [Rec. p. 94]	11,403
Accounts receivable [Rec. p. 94]	29,400
Northport smelter [Rec. p. 97]	288,289
Republic mine [Rec. p. 1367]	46,500
Mining stock [Rec. p. 93]	288,239
Lodes and patents [Rec. p. 1366]	30,929
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No. 5 timbering [Rec. p. 1367]	120,016
No. 5 shaft [Rec. p. 1367]	65,057
Sawmill [Rec. p. 1366]	15,124
No. 5 level [Rec. p. 1366]	514,804
No. 5 picking plant [Rec. p. 1360]	30,022

Assay office [Rec. p. 1366]	4,311
No. 5 shaft [Rec. p. 1367]	31,246
Total	$2,014,532

ORE REMOVED FROM MINE.

1,777,591 tons. [Rec. p. 902.]

ORE REMAINING IN MINE.

(Burbridge's estimate): 1,650,849 tons.
(Greenough's estimate): 2,210,000 tons.

GROSS RETURNS.

The gross returns to October 28, 1916, were $20,-972,610, to which add $1,048,864 ore in transit, upon which returns had not been made, making a total of $21,021,474.

NET PROFITS.

The net profits (appellees' brief No. 2, pp. 67-68) were $12,019,128; to which add profits on ore in transit amounting to $680,000, would be $12,699,128.

COST OF EXTRACTION.

The cost of extraction to October 28, 1916, was $8,322,346.

Operations From August, 1915, to September, 1916

Date	Cash on Hand	Dividends	Expense	Page Rec.
Aug., 1915,	$257,000	.....	$ 25,000	1166
Sept., 1915,	146,000	.....	82,000	1171
Oct., 1915,	158,000	32,000	100,000	1144
Nov., 1915,	157,000	32,000	134,000	1191
Dec., 1915,	242,000	32,000	138,000	1199
Jan., 1916,	342,000	32,000	110,000	1153
Feb., 1916,	400,000	64,000	131,000	1136
Mch., 1916,	507,000	64,000	134,000	1209
Apr., 1916,	470,000	96,000	132,000	1319
May, 1916,	538,000	128,000	159,000	1329
June, 1916,	767,000	288,000	130,000	1337
July, 1916,	670,000	504,000	129,000	1345
Aug., 1916,	375,000	256,000	157,000	1353
Sept., 1916,	101,000	.....	93,000	1359
14 months,	$5,120,000		$1,654,000	
Average per mo.,	365,714		118,143	
Average 1916, 10 months,			130,555	

Eugene R. Day's Estimate.

Day based his estimate on the assumption that the mine had paid $10,000,000; that it was three-fifths worked out and two-fifths remained [rec. p. 754], which he valued at $4,000,000, stating that "two-fifths of $10,000,000 was $4,000,000."

His Errors.

If mine had paid $10,000,000 when three-fifths worked out, the remaining two-fifths would be $6,666,666, and discounted at 6 per cent compound interest for 4.7 years would be	$4,995,268
Add ore in transit	1,048,868
Cash, less debts,	370,521
	$6,314,657
Add value of other property	2,014,528
	$8,329,285
But his estimate of $10,000,000 profit was $2,000,000 too low—so add $2,000,000, discounted at compound interest for 4.7 years at 6 per cent	1,500,000
Value	$9,829,285

Property Exclusive of Ore in Mine.

Incidental property	$2,014,528
Cash	370,521
Ore in transit	1,048,868
Total	3,433,917

Tonnage.

There had been removed from mine	1,777,591 tons of ore
Burbridge estimated the future tonnage at	1,575,600 " " "
Greenough estimated future tonnage at	2,210,000 " " "

The average net profit per ton during life of mine was $7.29
The average net profit per ton from 1908 to 1912, inclusive, 3.37
The average net profit per ton from 1908 to 1915, inclusive, was 5.33
The average net profit per ton for 1916 was 9.40
The average net profit per ton for years 1913, 1914, 1915 was 7.00
The average tons per vertical foot to October 28, 1916, 808
The tonnage per vertical foot, October 28, 1916, was 1,400
The average lead content for milling ore for life of mine was 9.85%
The average lead content for 1916 was 10.88%
The average silver content for milling ore for life of mine in ounces, per ton, was 8.60
The average silver content for milling ore for 1916 in ounces was 8.73
Greenough states the mill feed average was, in ounces 9.4
But he included zinc ore of about 600 tons.

MARKET VALUE OF SILVER AND LEAD.

Lead, per Hundred		Silver, per Ounce, in Cents.	
1901,	4.36		
1902,	4.10		
1903,	4.26		
1904,	4.32	1904,	57.22
1905,	4.705	1905,	60.35
1906,	5.66	1906,	66.79
1907,	5.35	1907,	65.32
1908,	4.236	1908,	52.86

1909,	4.30	1909,	51.50
1910,	4.45	1910,	53.49
1911,	4.46	1911,	53.30
1912,	4.485	1912,	60.83
1913,	4.40	1913,	59.79
1914,	3.87	1914,	54.81
1915,	4.675	1915,	49.685
1916,	6.83	1916,	65.66

The tonnage for ten months of 1916 to October 1 was 261,968.	
The above consisted of crude ore and concentrates amounting to	$ 70,871.61
The tonnage for November and December, 1916, was, in crude ore and concentrates	16,317.50
The tonnage for November and December, 1916, was 23% of the previous ten months.	
The net profits for 1916 up to October 28 was	2,368,682.90
The estimate for November and December is	544,807.06
Total for 1916	$2,913,489.96

The net profits for 1916 were 73¾ per cent of the estimated value of the mine, less cash and ore in transit.

The year of 1917 was a more profitable year than 1916.

No. 3273

IN EQUITY

6

United States
Circuit Court of Appeals
For the Ninth Circuit

MATHILDE CARDONER,

Appellant,

vs.

EUGENE R. Day, et al,

Appellees.

BRIEF OF HARRY L. DAY AND JEROME J. DAY, ANSWERING APPELLANT'S REPLY BRIEF.

Upon Appeal From the District Court of the United States, District of Idaho, Northern Division.

JAMES E. BABB,
Lewiston, Idaho,
Attorney for Harry L. Day.
ISHAM N. SMITH,
Wallace, Idaho,
Attorney for Jerome J. Day.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MATHILDE CARDONER,

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vs.

EUGENE R. DAY, et al,

Respondents.

Brief of Jerome J. Day and Harry L. Day Answering Appellant's Reply Brief.

Appellant in a reply brief of approximately 85 pages, has made almost a total re-presentation of the case in chief, and a few matters in the reply brief not covered by brief of associate counsel seem to deserve attention, viz:

I.

The position of all the respondents, relating to findings of fact by Judge Dietrich, is set forth in the brief of associate counsel, and will not be repeated here.

II.

That particular knowledge of all the affairs of this partnership was open and accessible to Mrs. Cardoner as much as to Mr. Day. See our main brief pp. 117-122.

In Geddes Appeal, 80 Pa. St. 447, which was an action to rescind a sale of a partnership interest to a co-partner, the court speaking unanimously through Justice Paxson (Agnew, C. J., and Sharswood, Mercur, Gordon and Woodward concurring) said (. 461):

> "It is unnecessary to go over the allegations of concealment and misrepresentation in detail. In the absence of inadequacy of consideration, they are not especially significant * * * (. 462). "If Mr. Geddes was deceived, it was his own fault. He had the fullest access to the books. These books were his books; they belonged to the firm of which he was a member. No one ever denied him access to them. * * * It is not to the purpose that he did not understand them. He could have obtained the information from the bookkeeper. He had the means of information. * * * He cannot charge anyone else with the consequences whatever they may be of his own neglect."

At bar, Judge Dietrich says: (pp. 1388-1389):

> "It is not a case where the principal is at a distance and wholly dependent upon the information furnished him by his agent or associate, or is a stranger with no one to whom to turn for assistance or advice. The company's mill was within a few moments walk from the offices at Wallace, and the mine a few moment's ride upon the train or automobile. They were at all times accessible and open to the plaintiff; and so were the books and records of the company. Of this there is no question. She had agents at Wallace and she had acquaintances and friends. If she did not understand an item in one of the

> monthly statements, she could as readily and as reasonably have asked Allen for assistance, as in the case of of the Administrator's account; or she was abundantly able to employ services of that character. She had engaged counsel who was not only qualified to care for her interests in their legal aspects, but was also exceptionally familiar with the history and operation of the Hercules as well as other mines in the district. At intervals she was a guest at the house of the presiding judge at the state district court, at one time her attorney, who was also familiar with the history of the district, and in a general way with the various properties therein."

Other matters of her knowledge of the particular Coeur d'Alene district where this Hercules mine is located, of the neighboring mines, depth of probable ore bodies below the water level, character of ore bodies, mineral wealth and productiveness have been argued heretofore.

III.

CHANGE OF ATTITUDE.

At page 6—Point Two—page 9 Point Nine—pages 13 et seq. point III., of the reply brief, extended comment is made upon the pretense that respondents have changed their position in this case.

These arguments relate to the point made in our main brief that Mrs. Cardoner did not rely upon E. R. Day for information, pending this negotiation; that she had severed all confidential relations with him, hired her own agent, had taken advice from

her coowners and friends, and conducted an independent investigation concerning the advisability of sale, value and other matters.

This argument is not a change of our position. In the answers of Jerome J. Day and Harry L. Day, the question of *Reliance* by Mrs. Cardoner on E. R. Day is directly made an issue. But the issue on the points of her reliance on E. R. Day is quite distinctly marked. These defendants say:

> "(R. p. 143—bottom). Defendant is without knowledge allegation 6 p. 152.

Under that denial, the position taken is clearly within the issues and no new position is taken.

The law cited by us under point III p. 114, and the arguments advanced at pp. 80 to 125 are illuminated by the following quotations from the Reply brief of appellant at pages indicated, to-wit:

> "(P. 32-33) quoting from Ledington v. Patten, 86 N. W. 571 (581) quoting from Sec. 958 2 Pom. Eq. Jurisprudence, as follows:
>
> "'A trustee may buy from the cestui que trust provided there is a distinct and clear contract, ascertained to be such, etc.'
>
> "(p. 43, quoting from Pomeroy's Equity, Sec. 958,) 'There is, however no imperative rule of equity that a transaction between the parties is necessarily, in every instance voidable. * * * and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the

> transaction will be sustained by a court of equity."

Indeed, Plaintiff's conduct in having separate counsel during administration, appointing a new agent and serving notice of the appointment, shows she was in fact not depending on E. R. Day but acting independently of him and besides, she must have realized when she made her offer, that she had challenged his individual interest in conflict with her own, to some extent at least, as said in Elmore vs. McConaghy, 159 Pac. 108 (Wash.) where it was said:

> "Whatever fiduciary relation was imposed on the partners toward each other * * * ceased when they began to negotiate between themselves as to the price to be paid by one for the other's interest,"

and the court refers to vendors duty to have examined the books for himself.

In support of the same idea in Mallory vs. Leach 35 Vt. 156; 82 Am. 625, the court said:

> "If * * * confidence ceased to exist and alienation and distrust had taken its place, then it is obvious he could not have supposed she was relying upon his friendship and advice."

Notwithstanding the relation of husband and wife is the most confidential known, she is not in a position to claim reliance upon him after she has gone to his business associates criticising his business policy

and hires a lawyer in her own interest and appoints an agent and notifies her husband and others of her appointment of the agent and he takes over management of her affairs. She cannot claim the prior close confidence and that she as relying on it alone and have her agent and independent advice also.

IV.

And here we may note the distinction already pointed out that this sale was not made by the trustee to himself; nor is it one where he conducted the sale at all. This transaction (sought out and opened by plaintiff's offer) is between partners, each of whom is a sui juris, each having equal power of access to all the books and records of the company, the property of the co-partnership and to obtain all information which the other could have obtained from the various employes and assistants of the company of which each was a member.

Here, the trustee was not charged with the duty of selling, nor did he sell, nor did he institute the negotiations. Pertinent language discriminating between the facts here and those which are found in many cases cited by appellant's counsel is found in Golson vs. Dunlap, 14 Pac. 476 (Cal.) heretofore cited to-wit:

> *"Where the trustee is charged with the duty of selling the property and he does not deal directly with the cestui que trust* * * * and

whether he takes a conveyance directly to himself or acts through the intervention of a third person, the sale, although *not,* as a general rule, absolutely void (Blockley v. Fowler 21 Cal. 329; Boyd v. Blankman 29 Cal. 19,) is avoidable at the election of the cestui qui trust, (Blockley v. Fowler, 21 Cal. 329; Guerrero v. Ballerino 48 Cal. 118; Tracy v. Colby, 55 Cal. 71.) without reference to the adequacy of the price, (San Diego v. Railroad Co., Cal. 100; O'Connor v. Flynn, 57 Cal. 293.) These decisions are in accordance with the great preponderance of authority elsewhere. * * *

"The distinction between the above class of cases and those in which the trustee purchases directly from cestui qui trust, although not always observed, has been frequently pointed out. See Lewin Trusts, 463; Pom. Eq. Jur. Sec. 957; Ex parte Lacey 6 Ves. 626; Cowee v. Cornell, 75 N. Y. 100; Brown v. Cowell 116 Mass. 465."

In this latter class of cases inquiry will be made into the fairness of the transaction, and under proper conditions it will be sustained"

The fiducial duties of E. R. Day did not involve his sale of Mrs. Cardoner's property nor was he ever the holder of the legal title. We believe the discussion heretofore made in our original brief answers the elaborate argument of appellant upon this branch of the case.

V.

Even if Sec. 5543 R. C. of Idaho were applicable and even if it had declared sale "void" as did the Oregon statute. opinion of Hunt J. Mu. Ben. Life Ins.

Co. v. Winne 49 Pac. 446 (Mont.) supports that of Gilbert, Circuit J. in Mills v. Mills 57 Fed. 873 (Orig. Brief p. 76) in holding that "void" as thus used means only "voidable." See also Cole v. Stokes 113 N. C. 270; 18 S. E. 321.

VI.

VALUE.

Again, appellant argues at length, the alleged value of this property.

We have pointed out that appellant contends that Mrs. Cardoner was entitled to the full estimated probable and prospective value, based upon calculations of supposed ore bodies, to the end of the mine's supposed life.

The Supreme Court of California says in

GOLSON V. DUNLAP 14 Pac. 576 (579):

> "It is proper to say for the guidance of the court below upon a re-trial, that it is not the highest possible price that must be taken as a standard, but the fair reasonable value of the property. Speaking of transactions with expectant heirs and reversioners, a class of whom, on the grounds of public policy, the greatest protection is afforded, (compare 1 Perry, Trusts, Sec. 188) Judge Story says: "It is not necessary to establish in evidence that the full value of the reversionary interests or other expectance has been given according to the ordinary tables for calculations of this sort. It will be sufficient to make the purchase unimpeachable if a fair price, or the fair market price, be given therefor at the time of the dealing.' 1

Story Eq. Jur. Sec. 336."

As remarked in the foregoing extract, the time to be taken is the time of the deal. A subsequent advance is not to be regarded. In the leading case of Fox v. Mackreth, 1 Lead Cas. Eq. 115, Lord Thurlow would not give any weight to the consideration that the trustee happened to sell at an advanced price, saying: 'The money would be due not in consequence of what Maskreth afterward sold it for but what Fox lost by it at the time.' So, in Coles v. Tretcothick, 9 Ves. 246, where the trustee had subsequently sold for a greater sum, Lord Eldon said: 'Inadequacy of price does not depend upon a person giving a pretium affectionis from any particular motive, beyond what any other man would give—the reasonable price * * *

Accidental subsequent advantage made of a bargain is nothing. * * * The fair value at the time under all circumstances must be the criterion."

Briefly recapitulating the facts here, they show that the contract was not made until after the estate had been delivered to the heir, the final decree had been rendered and filed and recorded, the final report approved and the purchaser had refused to pay more than his offer, and told the agent of the seller that he "was done," to "offer it to anybody else he wanted to." Such statement was made after the threat to sell out to the known rivals of the Days, who were financially strong and who were believed by Mrs. Cardoner (if her complaint is true) to be able to smash the Days.

The sale was an undivided one-sixteenth (1-16)

interest, and $320,000.00 of the consideration was paid in November, after the technical discharge of the administrator had been finally entered.

Appellant's counsel urge the profits in the war period of 1916, showing an inadequacy of price; *but Mrs. Cardoner received her* 1-16th *of those profits up to October* 1*st,* 1916, *and cannot be heard to say that she was unaware of such profits.*

She knew she was selling during the war, and when prices for mineral were high; her other information of the mine, its outlook, its property in the Smelter and Refinery, the ore in transit and the cash on hand have been heretofore shown.

VII.

GREENOUGH'S ESTIMATES: ORE IN TRANSIT; CASH ON HAND.

Counsel cannot, and do not attempt, to destroy the physical facts as testified to by Burbidge, relative to the size, length and number of ore bodies. But, as heretofore shown, these uncontradicted facts destroy Greenough's estimates, because he claims four (4) ore shoots, whereas there were only three; he ascribes lengths and widths to the supposed ore bodies which he measured as per timbering, whereas Burbidge gave the true size from physical measurements.

At the oral argument and in the reply brief, op-

posing counsel complain that we have made Greenough's true estimates less than Burbidge's estimates. This is necessarily true when the same length and width of ore bodies is taken as established by physical facts because Burbidge estimated a probable depth of 1900 feet below the Hummingbird Tunnel, whereas Greenough estimated 1600 feet only. It must necesarily follow then, that Greenough's estimates would be less than Burbidge's, when the same length and width of ore bodies are allowed both. Illustrative of this phase, it is plain that a timber which is one foot square and 19 feet long will contain more lumber than one which is one foot square and only 16 feet long.

So, when Mr. Greenough estimates four (4) ore bodies instead of three and ascribes erroneous lengths and widths to them, his calculations are based upon an impossible condition and hence are untrue; and likewise, if his ore bodies are scaled to the physical facts, his tonnage must be less than Burbidge's estimates, as Greenough takes an estimate of 1600 feet, whereas Burbidge takes a depth of 1900 feet.

Because we have scaled Greenough's estimates to the physical facts, it is urged that we are "figuring down" the values. The correctness of respondent's testimony on the number and size of ore bodies has

not been controverted.

ORE IN TRANSIT.

Opposing counsel persistently treat this as all profit and as cash immediately available. In their main brief at page 102, is a tabulated statement, made from the answers to the interrogatories of E. R. Day.

From this table it appears that the total net smelter returns from the entire mine were $20,972,610.00 and the total dividends were $9,981,227.00, up to October 28th 1916, the date of the sale. It thus appears that the dividends were a little over 47 per cent of the NET SMELTER RETURNS. But, the table does not show the cost of mining, nor any of the items that are necessarily spent in extracting the ore and preparing it for shipment; nor, is the income tax of 1916 deducted. When these items are also included in the deductions, it leaves an ESTIMATED DIVIDEND in the ore in transit of approximately $400,000.00 only, instead of the entire value as counsel have erroneously assumed.

Notwithstanding these plain facts, opposing counsel hold up the entire value of such ore in transit ($1,048,864.14) as all profit (and as practically cash in bank—though the ore is yet to be treated, purchasers found, sales made and money collected) hoping thereby to create the impression that the price

paid was not a fair valuation of the 1-16th interest sold.

Because we have shown that Mrs. Cardoner's 1-16th of the probable dividends in the Ore in Transit was $25,000.00, and have taken the present value of that sum based upon the undisputed testimony that ore in transit of that value will and must be, in transit to the estimated end of the mine's life (10 years) and have calculated such present worth on the rate of income testified to by Greenough, we are accused of a "figuring down" process, although our calculations are not challenged as incorrect. If plaintiff had remained a partner, her share of the ore in transit, must remain in transit and could not be had in cash. ,

CASH ON HAND.

In the settlement and sale, the ESTIMATE of cash on hand was $600,000.00. The cash balance was $649359.48, from which should be deducted the amount due the Northport smelter, to-wit, $278,-838.35, leaving a book balance of $370,521.13; which we have heretofore been content to treat as the cash. But the costs of operations must also be deducted from that sum. It is therefore seen that in the treatment of the item "CASH ON HAND," the respondents have been more than liberal with Mrs. Cardoner. That she was overpaid in this item, has not

been refuted by appellant's counsel.

The estimate of cash on hand at page 60 of the reply brief, as well as our own former estimates, omit the very large element of operating costs for the current month, which greatly reduce this item.

TONNAGE EXTRACTED—LIFE OF MINE.

Much time is spent in arguing about the tonnage and the future life of the mine.

In Burbidge's testimony (p. 903) we find:

> "From January 1st, 1907, to October 28th, 1916, a period of 9 years and 10 months, there was mined 1,650,849 tons of ore, an average of 167,888 tons per year. At the same rate of extraction the 1,575,600 tons in the mine as of October 28, 1916, would last 9.4."

In Greenough's testimony (pp. 1090-1091) we find:

> "The Court. Do you understand the question?
>
> A. Yes, that is assuming a rate of production as Mr. Burbidge stated of 167,888 tons, how long would it take to work out the tonnage. That would be thirteen and three-fourths years.

Again at p. 1100, Greenough says:

> Q. How many tons per annum did you figure on being produced there?
>
> A. Well, at the rate of production in 1916, which the mill apparently has the capacity to handle, up to the 10th day that would be at the rate of 400,000 tons a year.
>
> Q. I thought you said the mill had a capacity of 800 tons per day?
>
> A. No. I said 850 to 875 tons.
>
> Q. Now how many tons per annum would

that be?

A. That would be 310,500.

Q. 310,500?

A. Yes.

Q. Is that the rate that you figured that would be mined out?

A. I say I didn't figure a rate. But if you take the rate they are mining now and the capacity of their plant, which they did mine in 1916, and at that time, they did mine the tonnage I estimated, mine that out in 7.7 years.

Q. As the mine goes deeper into the earth they will be able to operate it as rapidly and withdraw the ore as rapidly as they did above that tunnel level? * * *

A. Certainly. They have shown an increased production every year and I have only assumed that it will only go 1500 feet.

Q. To the end of its life the production will be as rapid as it was during the last year in your judgment?

A. Not to the end of its life it wouldn't, but to depth it would. That is all I took in my assumption."

It was shown by the above testimony that Burbidge took the average tonnage as a basis upon which to estimate the future life of the mine; Greenough takes the capacity tonnage under war pressure and prices, and assumes that the mine will be operated at the tonnage capacity every day, to the end of its life. Again he makes no allowances for labor troubles, strikes, shutdowns, and the numerous and multiplied emergencies which arise in mining. Appellant's counsel fall into the same error in his calcula-

tions of present value, and "estimated" imaginary value of a property, which was and is 75 per cent speculative because the ore bodies were undisclosed. All the argument of opposing counsel accentuates the point heretofore made that mining property is speculative and problematical in value, always, and that persons who deal with such property calculate their chances of value, taking into consideration the PROBABLE existence of dikes, faults, and geological faults; of labor troubles, shut-downs, depreciation of mineral content, failing markets, transportation difficulties and all and every kind and manner of loss, wastage and depreciation involved in that complex and knotted phase known as a "miner's chance."

Although opposing counsel concede that 52 per cent of the mine was worked out on October 28th, 1915 (reply brief p. 68, sub-paragraph (9) ; and page 71, sub-paragraph (1)) which yielded only 1,575,600 tons of crude ore (reply brief sub-paragraph (9)) yet they persistently argue that Greenough's *estimate* of 2,210,000 tons (reply brief page 63, sub par. (d) is correct. But if 1,575,600 tons is 52 per cent of the mine content, it is necesarily true that 48 per cent cannot be 2,210,000 and the calculations of Greenough and appellant's counsel are palpably erroneous.

VALUE FURTHER CONSIDERED.

At the oral argument and in the reply brief (p. 73) counsel stress two facts and conclude that the value of the mine is $10,000,000.00.

Their argument is:

(a.) That the mine was paying $3,000,000.00 annually on October 28th, 1916.

(b.) That Burbidge said the life of the mine was 9.4 years.

But if these premises are correct, or if we take 10 years as the life of the mine as estimated by the Days and argued in the original brief, the premises show a valuation of $30,000,000; however, opposing counsel have not the temerity to argue the conclusion which their non-congenial premises force. They claim a valuation of $10,000,000.00, on premises which if true, would force a conclusion of $30,000,000.00,

Wherein, then are their premises false. In the items noted as follows:

(a.) The profits of 1916 and every war year, were based upon WAR or BOOM prices and upon an urged and urgent capacity production which we have shown to be far in excess of the average or ordinary production; and overlooking increasing war costs and taxes and assuming, wholly underground conditions concerning which nothing is known.

(b.) The time (9.4) years is predicted upon Burbidge's statement, based upon the average production.

The fallacy and defects in the argument arise from the fact that at the rate of production (sufficient to yield $3,000,000) per year, calculated at the extreme war prices the tonnage extracted would exhaust the mine in less than five (5) years, and the continuance even during the five years is based only on assumption and not on knowledge or proof.
(Appellant's original brief page 91.)

The profits estimated in this period are war-profits, and were at an end when the armistice was signed; they were impossible even when appellant's original brief was served (1-30-1919) and when the reply brief was written. Notwithstanding these cold facts, appellant strongly insists that those prices ought to have been taken by E. R. Day when buying this property and because he did not do so, he has perpetrated a fraud.

We quote from appellant's original brief, p. 88:

> "The contention that during the year 1916 abnormal prices obtained on account of the European War and should therefore be excluded, is not according to either reason or engineering judgment for the reason such conditions actually existed at the time and in so far as human judgment could discern, would continue for at least a reasonable time in the future. It is a matter of public knowledge that it was the general impression on that date that the war would not end for some years."

Again at page 89:

> "This is a fair basis as the mine was sold *at the very apex of high prices*, and it could be well assumed that the average of the previous sixteen years would prevail for the next ten years."

This argument, in view of the facts that the Armistice was signed in November, 1918, and the brief of counsel was not served until January, 1919, and of the further facts concerning the close of the war and hence the end of war prices, lacks but little of being fatuous.

The evidence of Burbidge given while the war was still raging, shows that he appreciated the calamatous break in prices and the business and financial condition which was bound to follow the cessation of hostilities. Guggenheims conservatism on renewal of smelting and purchasing contract shows they realized it. Harry L. Day says he took the matter of the World's war into consideration, in determining whether to go into the deal or not. It is hardly proper, we submit, to base a charge of fraud and deceit on far-sighted conception of financial policies, directly caused by cataclysms in human affairs.

At page 73 of reply brief, appellant says:

> "We believe that it is not possible to say that the appellees have proven the mine to be worth less than $10,000,000.00. We further believe that by a fair preponderance of the testimony we have shown the value of the Hercules Company's property to be worth over $10,000,000.00."

This conclusion ignores the uncontradicted testimony of Burbidge, Paulsen and Hutton; the refusal of E. R. Day to pay more than he did, and his statement of Allen to offer it to any one else, that he was "done"; the testimony of E. R. Day, Harry L. Day and Jerome J. Day as to their valuation based upon their knowledge of the mining man's "chance"; the advice of Allen, Judge Woods and the impossibility of Greenough's imagined ore bodies. Every foot in further depth was simply a guess as to ore continuity. There is no evidence as to what depths will show.

This question of value was thoroughly considered by the trial court. Mrs. Cardoner sought to force a higher price by a threatened sale to the strongest competitor which the Days had, at a time when she knew the World's war was on, and when prices were —(Appellant's original brief p. 89—"in the very apex of high prices"—thus demonstrating her shrewd cunning and resourcefulness, as found by the trial court.

Two very great, vital factors are ignored by the plaintiff, viz.:

(a) The great loss which occurs to the owners at the end of operation of any great mine. The operation of the mine depends on speculation each day as to the continuity of the vein and its ore content. After many years of great success, the owners, who

have from time to time taken the chances on vast expenditures, for new tunnels, shafts, processes and machinery, and for discovery of new ores and been successful so often, will not incline to give up and abandon the mine and its equipment, when the ore is finally exhausted forever, until they have suffered a great loss, from vast expenditures in seeking, as they did successfully, many times before, to find pay ore again. The owner who quit and sells out escapes that loss.

(b) The owners faced three alternatives (1) A new smelting and sale contract with Guggenheim interests at rates considered intolerable, (2) Building their own smelter and refinery and securing purchasers in competition with Guggenheims or (3) Closing the mine.

The Guggenheim contract, offered, represented their view of future values. If their view was sound, the Hercules owners will not be able to smelt, refine and sell for any more than Guggenheims offered. All plaintiff's contentions as to value involve the proposition that Guggenheims, did not know what they were doing, and that they were ignorant of bright prospects, plaintiff claims will continue, in the metal market. E. R. Day told plaintiff he believed the ore would be good and that the smelting, refining and selling plan would win and while she

did not and would not believe it, then, her representatives now reverse about, and say, yes prices will be better even than defendants expected--not mentioning increased costs, and claim to have established to a certainty, cash value of entirely unexplored depths, value of which, even if found, depends on equally unexplored future costs and markets.

Respectfully submitted,

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Attorney for Jerome J. Day.

No. 3273.

United States
Circuit Court of Appeals
For the Ninth Circuit

MATHILDE CARDONER,

Appellant,

vs.

EUGENE R. DAY, ELEANOR DAY BOYCE, EDWARD BOYCE, HARRY L. DAY, JEROME J. DAY, F. M. ROTHROCK, L. W. HUTTON, AUGUST PAULSEN, F. P. MARKWELL, C. A. MARKWELL, MARY SEAWELL MARKWELL, EFFIE MARKWELL LOEBAUGH, ELIZABETH SMITH MARKWELL, EMMA MARKWELL BUCHANAN, BLANCHE DAY ELLIS, HARRY R. ALLEN, AND THE HERCULES MINING COMPANY,

Appellees.

REPLY BRIEF OF APPELLEES, EUGENE R. DAY, ELEANOR DAY BOYCE, EDWARD BOYCE, F. M. ROTHROCK, L. W. HUTTON, AUGUST PAULSEN, F. P. MARKWELL, C. A. MARKWELL, MARY SEAWELL MARKWELL, EFFIE MARKWELL LOEBAUGH, ELIZABETH SMITH MARKWELL, EMMA MARKWELL BUCHANAN AND BLANCHE DAY ELLIS.

C. W. BEALE and JOHN H. WOURMS,
Solicitors for Appellees Eugene R. Day, Eleanor Day Boyce, Edward Boyce, F. M. Rothrock, L. W. Hutton, August Paulsen, F. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Loebaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan and Blanche Day Ellis.
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The untenable position taken at the oral argument of this case has been reasserted in appellant's reply brief, to-wit:

That a finding of fact of the lower court, involving conflicting testimony and the credibility of witnesses, made in

the opinion of the lower court, which was signed by Judge Dietrich, is not unassailable and conclusive upon this appeal, or as unassailable and conclusive as would be such finding if made in a special document independent of the opinion. Such a position is unsupported by any of the decisions cited in the reply brief. A complete answer to such unauthorized contention will be found in the following brief statements:

(a) A finding of fact is just as much a finding of fact when made in the opinion of the District Court as it would be a finding of fact found by such court in some other document, and a conclusion of law in the opinion of the Court is just as much a conclusion of law as though such conclusion were concluded in a paper different from the opinion.

(b) There is no Federal statute, nor rule of the Supreme Court, requiring a District Court to make a finding of fact and conclusion of law in any document separate from the court's opinion.

(c) The Supreme Court of the United States has repeatedly laid down the rule that errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by the Supreme Court, if there is any evidence upon which such findings could be made.

(d) The contention of appellant is in direct conflict with the ruling of the Supreme Court of the United States. That Court having held, in the absence of separate finding of facts, that it is the duty of the Court to accept the finding of facts in the opinion of the Lower Court.

Counsel for appellant do not claim that the court did not make findings, but what they complain of is that the findings upon the material issues were made against their client.

The case of York v. Washburn, 129 Fed. 564, which involved an action at law and not a suit in equity, instead of being a decision in support of the point upon which it is cited, holds to the contrary. The language of the court supported by numerous decisions of the Supreme Court of the United States found on page 566, being as follows:

> "That which the record discloses is nothing more than a general finding of all the issues in favor of the defendant, but, whether the finding be general or special, it has the same effect as the verdict of the jury, and, in the circumstances in which it was given, is conclusive, and prevents any inquiry in this court as to whether it is sustained by the evidence."

Among other decisions cited in that case by Judge Van Devanter is the case of Dooley v. Pease, 180 U. S. 126, wherein on pages 131 and 132 will be found the following language of the Supreme Court of the United States:

> "Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this court, if there was any evidence upon which such findings could be made."

We will not impose upon the patience of the court by extensive citation from available decisions rendered by the Supreme Court, resting content with the statement of the rule as announced by that Court in Adamson v. Gilliland, 242 U. S. 350, page 353 of the decision:

> "That so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' Davis v. Schwartz, 155 U. S. 631, 636."

Regardless of what the holding may be in some other circuit, following the decisions of the Supreme Court of the United States, this court stated in Butte & Superior Copper Co., v. Clark Montana Realty Co., 248 Fed. 609, on page 616, its position in the following language:

> "Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

However, this question is not open to debate since the Supreme Court of the United States has held, that, in the absence of separate finding of facts, it is the duty of that court to accept the findings of facts contained in the opinion of the lower court. Such holding was made in the case of Lawson v. United States Mining Company, 207, U. S., 1, 12. In that case the Circuit Court neglected to make or file any finding of facts or opinion, as will appear both from the decision of the Circuit Court of Appeals, 134 Fed. 769, 771, and the decision of the Supreme Court, and the Court was unable to determine whether the decision of the Circuit Court was based upon a question of fact, or a matter of law. Under such circumstances, the Circuit Court of Appeals without making or filing separate finding of facts, did make certain findings in its opinion, which findings the Supreme Court held it was its duty to accept, notwith-

standing the fact that such findings were in the opinion and not in a separate finding of facts.

The court found among other findings:

(a) That the appellant was informed of the known conditions and facts bearing upon the value of the property.

(b) That the price paid her approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source. Record page 1400.

It is respectfully submitted that under the decisions of the Supreme Court of the United States and the prior holdings of this court, such findings are unassailable, binding and conclusive on this appeal.

The monthly statements furnished by the Hercules Mining Company, and which according to the undisputed testimony of appellee, Eugene R. Day, showed what the history of the Hercules mine had been, were accessible to appellant during the life time of her husband, and such statements for the months of July, August, September, October, November and December of 1915, and January, February, March, April, May, June, July, August and September of 1916, were delivered to her by Day after her return to Idaho in April, 1916. These statements show the total amount of dividends paid and the profits earned by the Hercules Mining Company up to the date of issuance thereof from the beginning of the company's operations, and from which she and her agent, Allen, had no

difficulty in arriving at the amount of such dividends paid and profits earned.

It is difficult to concieve of a case where the managing partner could have furnished to an associate partner a more detailed, specific and particular record of the history of a mine, upon which to base the valuation of an undivided interest therein, than disclosed by the record in this suit. The testimony is overwhelming to the effect that she was advised of the past history of the mine, its known conditions, and probable future, and that she received as consideration for the sale of her interest all it was worth. She consulted her partners, Paulsen and Hutton, her agent, Allen, and her former attorney, Judge Woods, before she sold, and their testimony is to the effect that she received all her property was worth, and the evidence of Mr. Burbidge discloses that she received more than it was worth. In opposition to her own judgment and that of her agent, her former attorney, her two partners and Mr. Burbidge as to the valuation and price, there is nothing but the entirely incompetent and speculative estimate of the witness Greenough, based upon an aggregate length of ore shoots and a width thereof, which the evidence conclusively establishes did not exist.

The testimony of Mr. Burbidge as to the valuation is particularly strong when it is remembered that in arriving at the valuation of $293,405.00 for her interest, which included the cash reserve and the ore in transit, he used as a basis for such valuation the history of the mine and acted upon the assump-

tion that the three ore shoots developed on the No. 5 tunnel, if they extended below that level 1900 feet, and were as productive as they had been in the past, should produce 1,575,600 tons. However, his estimate of value based upon such assumed tonnage is too high in view of the uncontradicted testimony as to the condition of the ore shoots below No. 5 tunnel, and appellant is bound by this testimony since it was introduced over the objection of counsel for appellees.

Instead of extending into the depths of the earth with their respective lengths as they appear on the No. 5 tunnel level, these ore shoots are only about one-half as productive below the No. 5 tunnel level as at and above such level; the west ore shoot with a length of 600 feet had shortened to a length of 500 feet on the 200 foot level below the tunnel, the middle ore shoot of 225 feet will merge in the west ore shoot on the 800 foot level below, and the eastern ore shoot of a length of 150 feet has cut out entirely between the 200 and 400 foot levels below the tunnel level. Hence we have a condition proven by the testimony adduced by appellant where there is found an ore shoot 500 feet long instead of an aggregate length of 975 feet of three ore shoots, and where a section of the ore shoot on the 800 foot level of a height of 50 feet will produce 33,333 tons of ore in the place of a section of the aggregate length of the ore shoots of the same height on the No. 5 tunnel level, which produced 60,000 tons. In other words, the tonnage on the 800 foot level below No. 5 tunnel level would be about one-half of the tonnage on the No. 5 tunnel

level. Hence, Mr. Burbidge's estimate of valuation based upon the history of the mine and the possibility of the extension of the ore shoots to a depth of 1900 feet below the No. 5 tunnel level is far in excess of the real valuation.

Counsel for appellees, Eugene R. Day and Eleanor Day Boyce, at his oral argument demonstrated by means of maps, submitted for the court's consideration, based upon the evidence in the case, not only the excessive tonnage of the witness Greenough, but also his excessive valuation and that his valuation instead of being $10,000,000 should only have been $3,718,072 for the entire property.

The uncontradicted testimony is, that in arriving at his estimate of tons and valuation he included an ore shoot 325 feet long and 5 feet wide for a depth of 1650 feet, which did not have any existence, and an ore shoot 630 feet long and 15 feet wide for the same depth where such ore shoot was only 600 feet long on the No. 5 tunnel and had shortened on the 200 foot level below to 500 feet and which below the 200 foot level was 12 feet wide instead of 15 feet, and he also included an ore shoot 220 feet long and 4 feet wide for the same depth of 1650 feet that merged entirely into the 500 foot ore shoot on the 800 foot level, and furthermore, based his estimate of tonnage and valuation upon another ore shoot 200 feet long and 4 feet wide of a depth of 1650 feet where such ore shoot was only 150 feet long on the No. 5 tunnel level, and cut out entirely between the 200 and 400 foot levels below.

Greenough's total tonnage was 2,310,000 tons; his excess tonnage above the No. 5 tunnel was 12,525 tons and below the No. 5 tunnel 1,062,351, making an excess tonnage of 1,074,876 tons, leaving a net tonnage of 1,235,124 tons.

He placed an arbitrary profit of $9.39 per ton on all ore above the No. 5 tunnel, and an arbitrary profit of $4.50 per ton on all ore below the No. 5 tunnel, that is to say, he placed an excess profit of $6.39 per ton on all the ore above and an excess profit of $1.50 per ton on the ore below the No. 5 tunnel.

There is no escaping the facts as to Greenough's excessive tonnage and valuation as the proofs in the case brought out by counsel for appellant show beyond question or controversy. When it is remembered that the appellee, Day, could not get Mrs. Cardoner to visit the mine, or send anyone of her choosing to inspect and examine the same, or to visit the office of the Hercules Mining Company, or have some person in her behalf examine the records and books of said company, and when it is further remembered that in preparing for the trial, though the mine and the records of the company were thrown open to them, appellant by her counsel in open court, protested against sending anyone, and did not send anyone, to visit the office and inspect the books, or to go into the mine and examine the same, what possible excuse can there be for the reiterated contention that Mrs. Cardoner was not advised as to the known conditions, or that she had not received a reasonable price for her interest.

The case of Nelson v. Matsch Ann. Cas. 1912 D. 1242 and

note are cited both in the original and reply brief of appellant. That case is not in point as it was one which involved false representations. In the case at bar we do not have misrepresentation, false representation or concealment. In the note cited in connection with Nelson v. Matsch at page 1246 Ann. Cas. 1912 D, will be found Geddes's Appeal, 80 Pa. St. 442, wherein Justice Paxson, on page 462, referring to the failure of the selling partner to investigate the partnership books, said:

> "He was selling his own property. He had the fullest access to the books. These books were his books; they belong to the firm of which he was a member. No one ever denied him access to them, and it is not even alleged that they contained any false entries. It is not to the purpose that he did not understand them. He could have obtained the services of an expert in case he failed to obtain the information from the bookkeeper. He had the means of information, and it was his duty to have availed himself thereof. He cannot charge anyone else with the consequences, whatever they may be, of his own neglect."

The books of the Hercules Mining company were Mrs. Cardoner's books. Any information they contained was her information. She was never denied access to these books.

The relationship of Day and Mrs. Cardoner imposed no obligation upon him to furnish her with information she had from her own property.

Hence there is no foundation in the record in this case upon which to base the contention that Day should have had the

books experted for Mrs. Cardoner before he could entertain her offer for sale.

Day furnished Mrs. Cardoner with the statements *containing the history of the mine, gave her all the information he possessed concerning the same, and repeatedly urged her to go herself or have someone go in her stead to inspect the books and examine the mine, but she would not do so,* and this suit never would have been heard of if it had not been for the interference of one Joseph R. Wilson, an attorney of Philadelphia, who inspired her to initiate the same without any knowledge whatever upon his part as to the value of the property she sold, being influenced by the sordid, selfish motive of receiving from her one-twelfth of the property she had sold, providing there could be secured a decree rescinding her freely and voluntarily executed conveyance.

The position of counsel for appellees that this suit was inspired by Wilson with a selfish motive and without any justification, was made impregnable by the conduct of appellant's counsel in open court who claimed that they were seeking to remove him as executor of Mrs. Cardoner's will and to eliminate him entirely from this case.

The futile attempt, by shuffling the figures, to escape the testimony of Mr. Burbidge as to the future profit on the ore to be mined from the Hercules mine, finds no support in this record, and as pointed out in appellees' original brief, the place to have attacked Mr. Burbidge's figures and to show any inaccuracies therein was at the trial, and such an attempt was

abandoned by counsel for appellant, as will appear from the following question by Mr. Graves on cross examination and Mr. Burbidge's answer thereto:

> "Q. Is the rest of your estimate, Mr. Burbidge—I am asking this without meaning to be offensive, as I am sure you know—is the rest of the figuring and estimating you have done there done as accurately as that part of it, do you think?
>
> "THE COURT: You need not answer that.
>
> "A. You have not shown any inaccuracy there yet, have you?" (Record Page 909.)

The sane and businesslike method by which Mr. Burbidge arrived at his conclusion of future profit commends itself both to the court and a prospective purchaser of a mining interest. He testified as follows:

> "In the five years 1908-1912 inclusive, the profit per ton of ore mined averaged $3.37."
>
> "MR. GRAVES: What was that last period you gave?"
>
> "A. 1908 to 1912. This was a period of normal prices for both lead and silver, and labor and other operating conditions were also normal."
>
> "It was difficult to estimate the probable profit to be realized on the ore yet to be mined, for many variable factors entered into the calculation. The period 1907-1916 included two boom periods, when the price of lead was higher than normal. On the other hand the cost of production was greater. In 1910, the first year in which operations were on present scale, the cost was $2.71 per ton of ore mined, and in 1916 it had grown to $5.25, an increase of over 90 per cent. The operation of the mine was just about to begin through the shaft; which would add 25 cents per ton to the cost."
>
> "This country had not then entered the war. But it was even then a matter of general belief that after the

war ends there will be a long period of business depression, which will necessarily mean low prices for lead and silver."

"Taking all these things into consideration, as well as the decreasing silver content and the increase of zinc, it was only possible to estimate the profit to be made on the remaining ore at from $2.50 to $3.00 per ton." (Record pages 903 and 904).

Under a period of normal prices for lead and silver and of normal labor and operating conditions, the profit on the ore mined from the Hercules mine averaged $3.37 per ton. Such ore was produced by operating the mine through tunnels. Operation of the Hercules mine subsequent to the time of sale was to be through the shaft, which would add 25 cents per ton to the cost of production. Deducting this from $3.37 the past profit per ton and we have $3.12, or a difference of twelve cents per ton between the past normal profit and Mr. Burbidge's estimate of $3.00 per ton, which would be more than consumed by the decreasing silver content and the increase of zinc in the place of lead in the ore contained in the Hercules vein below the No. 5 tunnel level, and the depressed business conditions necessarily accompanied by lower metal prices after the war, so accurately forecast by Mr. Burbidge.

The uncontradicted testimony of Mr. Burbidge proves that the increased production of ore and abnormal profits for the years 1914, 1915 and 1916, with which Mrs. Cardoner was familiar, cannot be taken as a measure, or guide, for fixing valuation, or estimating the future tonnage and profits, and that subsequent to 1916 the price for metal had so decreased

and the expenses of production so increased, as to leave the mine owners of the Coeur d'Alene district in a position not so advantageous as when operating under normal conditions.

His testimony needs no explanation and stands uncontradictable, let it speak for itself:

"Q. You spoke about the profits in 1915, and 1916, and 1914, and said something about abnormal conditions. Will you please explain to the court what you meant by that?"

"A Of course, I referred to the abnormal prices they—that have ruled for lead in the last two or three years. The normal price of lead over a long period, over a period of thirty years, is $4.32 1-2.

"Q. Yes. Go on.

"A. In 1916 the price was $6.83, or $2.50 a hundred more than normal. That is the reason that the profits in 1916 were so large. Also, under the stimulus of that high price, the mine had exerted every effort to increase its output, and had produced a larger tonnage than in the previous years.

"Q. What have you to say as to the present condition with reference to the profits as they obtain now, the expense of operation, and the price of lead?

"THE COURT. I thought he had explained that.

"MR. BEALE: No, at the present time, I mean.

"A. I did say that in 1916 the cost of production increased ninety per cent over that in 1910.

"Q. How is it today?

"A. There has been a still further increase.

"Q. How about the price of lead?

"A. The price of lead is now $6.25 per 100 as compared with $6.83 last year. With the increased cost of production, none of the mines of the Coeur d'Alene district today are any better off, if as well off, as they would be under normal conditions, with lead at $4.25."

Added to the above situation of a falling market and an

increased expense of production, was the inevitable income and excess profit tax, all of which conclusively establish that the purchaser of the Cardoner interest could not expect to recover from the ore in the Hercules mine a normal profit per ton in the future equal to the normal profit per ton realized in the past.

In addition to the evidence of her disinterested partners, her agent, and her former attorney that Mrs. Cardoner received all that her interest was worth, and the full market price for the same, the court is requested to make a careful investigation of the testimony of the appellee Harry L. Day, enumerating the considerations that influenced him to take a quarter interest in the property purchased by his brother from Mrs. Cardoner, since in the absence of such considerations he would not have been willing to do so, on account of the high price paid. (Record pages 975 to 980 inclusive.)

Mr. Harry L. Day also showed by his testimony, on cross examination, based upon a personal acquaintance, that the veins in the neighborhood of the Hercules mine were shorter and narrower as they descended into the earth, and also poorer in metal content. (Record pages 987 to 991 inclusive.)

His testimony in this particular is both intelligent and convincing, and directly in conflict with that of the witness Greenough, who was shown on cross examination not to have had any personal knowledge upon which to base a conclusion of such veins being longer and wider with depth. However, Mr. Day's testimony affirmed Mr. Greenough's report of the

date of June 3rd, 1916, made to the stockholders of the Marsh Mining company as to his work on the Marsh mine, which showed that the 900 foot level therein had been opened up and proven very disappointing and that the ore body on such level was considerably shorter and lower in grade than on the levels above. And Mr. Day's testimony also showed that the operations of the Marsh Mining company had been attended with great loss, in which operations that company had spent from three-quarters of a million to a million dollars and only got back $400,000.00.

The keystone of this litigation was the false averment that appellee Allen, as the agent and representative of Eugene R. Day and Eleanor Day Boyce and in conspiracy with them, induced appellant to sell her interest to Eugene R. Day. That stone crumbled at the trial, and the pretended cause of action of Mrs. Cardoner tumbled down upon the heads of counsel for appellant when in open court they consented to the elimination of Allen from this case, thereby acknowledging to the court that the suit had its inception in a false allegation.

Damian Cardoner, the husband of Mrs. Cardoner, before and at all times subsequent to the year 1901, when the Hercules mine was first operated as a dividend property, and up to the time of his death in February 1915, was the owner of the interest sold to Day by his widow.

Mrs. Cardoner lived for years at Burke within the very shadow of the mountain that walled the famous Hercules vein

and it is unthinkable and unbelievable that she should be ignorant of its wonderful history and its marvelous productivity.

Referring to her story of such want of information, Judge Dietrich was constrained to say and to find in his opinion that credence could not be given to the incredible.

The credibility of the witnesses was for the determination of the lower court, and it is respectfully urged that the court's findings involving such credibility and based upon uncontradicted evidence and testimony that overwhelmingly preponderated in favor of the appellees, are not only conclusive, but unassailable on this appeal.

Respectfully submitted,

C. W. BEALE and JOHN H. WOURMS,
Solicitors for Appellees Eugene R. Day, Eleanor Day Boyce, Edward Boyce, F. M. Rothrock, L. W. Hutton, August Paulsen, F. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Loebaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan and Blanche Day Ellis.

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On Appeal from the District Court of the District of Idaho

Joseph W. Wilson, Executor, Etc.
Appellant

vs.

Eugene R. Day, et al
Appellees

Motion For Rehearing

Etienne de P. Bujac,
Carlsbad, N. M.

Charles R. Brice,
Roswell, N. M.

Solicitors for Appellants

No. 3273

In The

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Circuit Court of Appeals

For the Ninth District

Joseph W. Wilson, Executor, Etc.
Appellant

vs.

Eugene R. Day, et al
Appellees

Motion For Rehearing

Comes the appellant in the above entitled and numberedcause, by his attorneys, Etienne de P. Bujac, Carlsbad, New Mexico, and Charles R. Brice, Roswell, New Mexico, solicitors for appellants, and moves the court to set aside the decree hereinbefore entered herein and grant to the appellant a rehearing on this cause and for grounds of motion says:

I.

The court erred in affirming the decree of the District

court for the District of Idaho, for the reasons and in the particulars hereinafter set out.

II.

The court erred in holding valid the sale to Eugene R. Day by Mathilda Cardoner of her 1-16 interest in the Hercules Mining Company's properties, for the reasons:

(a) That at said time the said Eugene R. Day was the administrator of the estate of Damian Cardoner, deceased, and said property was the part of said estate, although distributed at said time to said Mathilde Cardoner.

(b) The statutes of Idaho (Section 5543) provide substantially that no administrator must, directly or indirectly, purchase any property of the estate he represents, and that he must not be interested in any sale of said property.

(c) That such sale was apposed to positive law of the state of Idaho and therefore void.

III

This Court concludes, as matters of law and fact:

"On the other hand, a court of equity in considering the evidence will not weigh with great nicety at what precise time Mr. Day was legally absolved of obligation to his trust as administrator, but wil carefully weigh the case as one where the conduct of Day and Allen and all the circumstances of their dealings with each other and with Mrs. Cardoner must be subjected to the closest scrutiny, and upon the principle that Day held a fiduciary relationship and that unless

he has shown that he dealt with Mrs. Cardoner with entire fairness and absolute candor and with scrupulous integrity, the sale will be annulled. Day has been administrator of the estate of Mr. Cardoner and was a partner in the mines here involved, well knew the mining properties and was able to judge of their probabilities. He knew that M rs. Cardoner trusted him as administrator and that naturally she would seek information as to the condition of affairs from him. He knew practically all that could be known about the mines as a partner, by reason of having just theretofore had charge as administrator, he was bound by every rule of honor to give her all the knowledge he possessed, and not to conceal or omit to make full disclosure."

IV.

The duty of Eugene R. Ray, based upon the findings of fact and conclusions of law, stated in Paragraph 2 of this motion, was not complied with in the following respects:

(a) He did not give to Mathilda Cardoner, as "he was bound by every rule of honor to give her", all the knowledge he possessed with reference to the properties of the Hercules Mining Company, a 1-16 interest of which he bought from her, which is the subject of this suit, and omitted to make a full disclosure as to such knowledge the court found he possessed, as stated in Paragraph 2 of this Motion.

(b) He failed to pay a fair price, or what was ap-

proximately near a fair price, for said property which he bought from her.

V

The court has found that Eugene R. Day:

"Had been administrator of the estate of Mr. Cardoner and was partner in the mines here involved, and well knew the mining properties, and was able to judge of their probabilities" * * * * "He knew practically all that could be known about the mines."

and so knowing has not shown that he disclosed to said Mathilde Cardoner the following facts necessary for her to determine the value of the mine prior to purchase.

(a) From the date of the beginning of the negotiations for the purchase of the mine, to-wit: October 20th, 1916, until the date of sale, to-wit: October 28th, 1916, he never saw Mathilde Cardinor nor did he make any disclosures to her of any character, with reference to said mines, and property.

(b) The evidence discloses that Eugene R. Day never discussed with Mathilde Cardoner the value of said mine, or gave to her any information with reference thereto, of any character, with a view of purchasing her interest therein.

(c) The evidence fails to disclose that Mathilde Cardoner was given the following facts, which was necessary to have been known before any person could have determined with any degree of accuracy the value of her interest in said mine, and which information was in the possession of Eugene R. Day, to-wit:

1. That the net profits of the mine todate of purchase

had been $13,607,948.54, made up of the following items:

Net profits shown by books (Record Page 72.)	$11,915,886.74
Ore in transit (Record Page 95)	1,048,664.14
Profit on stock of the Selby Smelting & Lead Company (Record Pafe 96)	272,676.66
Cash on hand, less debts	370,561.00

2. That the great expense of purchasing protecting property, smelter, refinery mill, power, other mines, approximately a Million Dollars, taken fro mthe income, would not have to be duplicated.

3. That equipment, service improvements, tunnels, shafts, power hoists, cars, lighting, timbering tools, etc, that cost over a million dollars, would not have to be duplicated, which would increase thepercentage of profits for the future of the mine.

4. That there was a net profit of $2,368,682.90 earned to October 28th, 1916, for that ten months (Record Page 77.)

5. That the ore remaining in the mine approximated near 1,575,600 tons, which was 48 per cent of the total volume of ore originally in the mine.

6 That there was ore shipped and not paid for, on October 28th, 1916, amounting to $1,048,164,-14, the returns from which would be received daily and all received within 90 days, which made such item practically cash in hand.

7 That at the time of such sale lead and silver were at the highest price they had been in many years.

8. That the net profits for the ten months of 1916, to-wit: $2,368,682.90, were approximately 60 per cent of the value of Five Million Dollars placed upon the mine and its properties, less the $1,048,864.14 of ore in transit and subsequently paid for in a few days.

9. That there had been taken from said mine 1,777,951 tons of ore, which was sold for $21,985,472.84, gross, or $12.37 a ton and that the net profit for the 16 years of the ilfe of the mine had been $7.29 per ton.

10 She was not advised of any of the following facts:

The average net p rofit per ton during the life of the mine was $7.29. That the average net profit per ton from 1908 to 1915, inclusive, during which time lead and islver prices were practically stationery and the lowest was $5.33 ton. That the average net profit per ton for 1916 was $9.40. That the average net profit per ton for the years 1913 to 1916, inclusive, was $7.00 per ton. That the average lead content for milling ore was 9.85 per cent That the average lead content for 1918 was 10.88 per cent. That the average silver content for the life of the mine in ounces, was 8.60. That the average silver content for milling ore for 1916 in ounces was 8.73. That the cost of the equipment, including the smelter and refinery, and all other property except cash on hand and ore in mine, was more than Three Milion Dollars, all of which was carried as assets on the books of the company.

11 That he did not give the said Mathilde Cardoner measurements of the stopes from which the ore had been extracted, nor the size of the veins at the No. 5 level, the estimated ore production during the previohs life of the mine, nor the outlook for the future, nor its value upon

the market nor its content in silver and lead, without which no estimate could be made of the value of the mine. 12 That no information was given Mathilde Cardoner, except through casual conversation, because "she was coming into the property", and all was too general, and but little of which was valuable in determining the actual value of the mine. Accepting as findings of fact, the testimony which this court has stated was testified to by Eugene R. Day (except his estimation of value) there is nothing contained therein from which any person could determine the value of the Hercules mine, or in any manner approximating its value.

VI.

This court states in its opinion that:

"By what we have said it is very clear that the questions of the relation of the price paid by Day to the value of the interest conveyed by Mrs. Cardoner became most important. Difficult as it generally is to reconcile the different views of men experienced in mining matters in their estimates of th value of mining properties, nevertheless, it not infrequently becomes the duty of the courts to conclude from the evidence taken in the particular case whether the sum paid has true approximate relation to the value of the claim or property conveyed." * * * * "For example, it was perfectly plain by the September, 1916 statement that the dividends paid up to October 1, 1916, amounted to $10,379,527.72; that investments in real estate, timber lands, smelting stocks, accounts receivable, cash deposited—all set forth by items,

brought up the net income received to $12,019,128.04; that the cash received from January 1, 1916, to October 1, for ore sales was $2,861,304.61, which with $11,755.34 for interest and discount made receipts of $2,873,059.92, and that the net incomes for the period was $1,069,052.03. The difference between $1,804,-007.92, or over $400,000 more than the $1,400,000 distributed in dividends and actual net profits, is shown to be due to the difference in amounts finally received on ore in transit at the beginning and close of such period."

If, as the court finds, the figures stated are perfectly plain from the statement mentioned, then the statements furnished Mrs. Cardoner were so erroneous and so failed to state the facts as to be misleading in the following particulars:

There should be added to the more than Twelve Million Dollars net income, found by this court, the ore in transit, amounted to more than One Million Dolars, making the net income to date over Thirteen Million Dollars.

The ore sales to October 28th, 1916 during that year, instead of being $2,861,304.61, as shown by the court's findings, were actually $3,690,703.74. (Record Page 77)

That the operating expense for said time, instead of being $1,804,007.92, as the court found, from said statement, was in fact $1,332,020.84. (Record Page 77.)

That the net income for the period of from January 1st to October 28th, 1916, was not $1,069,052.03, as the court found was plainly shown by the September, 1916 statement, but was in fact more than $1,250,000.00 more

than this sum, to-wit: $2,368,682.90. (Record Page 77)

The court's fingings that it was plainly shown the difference of $400,000.00 paid in dividends above the earnings was the difference in amounts finally received on ore in transit at the beginning and close of such period, is erroenous in that, instead of there being an excess of $400,000.00 above the net income, the actual net income during the said time was approximately One Million Dollars more than the distributed dividends, which were $1,432,000.00 (Record page 96.)

That the learned writer of the opinion in this cause could not determine from said statement within a Million Dollars, round numbers, the income of the first ten months of 1916, nor was any other item named by him as being plainly ascertainable from such statement near the correct figures as to the fact referred to.

VII

That the statements Day claimed to have made to Mrs. Cardoner, with reference to the property were largely not disclosures in the sense in which he was required to make disclosures in purchasing the property; that they consisted largely of general statements, such as: "I told her everything", "I told her all about the property", "She wanted to know every little thing, and did, too", and such general statements, such being conclusions of the witness and from which the court could not determine what, in fact, he did tell her.

VIII

No fair disclosures, sufficient upon which to base a

judgment as to the value of the property, could have been made in the casual conversations testified to by Day; but it would have required expert assistants, book-keepers, measurements and figures, not carried in the head of Eugene R. Day, and these were never furnished, nor claimed to have been furnished, to Mrs. Cardoner.

IX

The court erred in holding that the fact that Mrs. Cardoner asked the advice of co-partners and other persons, also seemed anxious to sell on account of family affairs, should be considered in determining this cause, for the reason that if the full and fair disclosures were not made by Eugene R. Day and if the transaction was not fair and free from the appearance of unfairness, then it should be canceled|

X

The court erred in affirming the decree of the lower court because the price paid by the Appellee, Eugene R. Day, for Mrs. Cardoner's 1-16 interest in the Hercules Mining properties, did not approximate near to the real value thereof, and because the said Eugene R. Day did not clearly show by the testimony that the price paid by him approximated near to a fair value of said property. The following facts in evidence are sufficient to show that the mere categorical estimates made by the Day Brothers, Paulsen and Hutton, as to the value of said property, are not reliable, or at least they are sufficient to convince the court that Eugene R Day did not clearly show that the

transaction was fair and that the price paid approximated near to the fair value.

(a) The net profits to date of sale had been $11,915,886.74 (rec. p. 72), to which should be added $1,048,864.14, for ore sold and payment for which was later received (Rec. p. 95), and profits of $272,676.66 made on the stock of the Selby Smelting and Lead Company (rec. p. 96); cash on hand $370,561; making a total net profit of $13,607,948.54, on October 28, 1916.

(b) That the great expense of purchasing protecting property, smelter, refinery, mill, power, other mines, approrimating a million dollars (see page 58 of our original brief) would not have to be duplicated.

(c) That equipment, surface improvements, tunnels, shafts, power hoists, cars, lighting, timbering, tools, etc, that cost over a million dolars would not have to be duplicated, which would increase the percentage of profits for the future of the mine.

(d) There was a net profit of $2,368,682.90 earned to October 28, 1916, for that ten months. (rec. p. 77)

(e) That the ore taken out during November and December, 1916, was approximately 23 per cent of the amount taken out in the previous 10 months, which would make the net profits for 1916 approximately $3,000,000.

(f) The testimony shows that the year of 1917 was a more remunerative year than 1916, hence must have netted more than $3,000,000. (Rec. p. 854.)

(g) The net income for 1917, $3,000,000 or more, added to that for November and December, 1916, which was approximately $550,000, equalled about the value placed on the mine; or, in other words, the Days had their

money back within about 14 months after the purchase; the sale value being $5,000,000, less ore in transit valued at $1,048,864,14, of $3,950,135.85.

(h) Up to October 28, 1916 during the previous life of the Hercules, there had been mined 1,777,951 tons of ore, which was sold for $21,985,472.84 (including the $1,048,864.14, ore in transit), the gross average price per ton being $12.37.

(i) The estimated contents of the mine on October 28, 1916, as made by the defendants' expert witness, Burbridge, was 1,575,600 wet tons of crude ore, or equal to 48 per cent of the mine, and at the same average value of the previous 16 years would bring $19,490,172.00.

(j) There was ore shipped and not paid for (equal to cash) in 1916, to October 28, of $1,048,864.14. (Rec. p. 95)

(k) At the time of sale, metals were at the highest with no immediate prospect of lower prices, the average price of lead in 1916 was $6.83 and silver 65.66 cents.

(l) The net profit for 1916 was 73¾ per cent of the value placed on the mine and all Hercules property, excepting only the cash on hand and ore in transit, sold and equivalent to cash.

(m) There was property, equipment and new improvements of a greater value than $2,000,000 paid for out of profits that would not have to be duplicated.

(n) Net profits for the future would be very much greater proportionately because large expenditures would not have to be duplicated, and the mine was completely equipped—"One of the best equipped mines in the Couer d'Allene".

(o) The average mineral content of milling ore in 1916 was greater than for the previous life of the mine. That is, the lead content was 10.88 per cent and average was 9.85 per cent for 16 years. The average silver content was 8.73 ounces per ton for 1916, and that of the previous 16 years was 8.60 ounces per ton.

(p) Excluding the high grade ore mined and especially picked during the first five years, the ore has not become baser to a material extent, as claimed by appellees.

(q) The average tonnage per vertical foot to October 28, 1916, was 808. At that date the tonnage per vertical foot was estimated at 1400.

(r) The value placed upon the mine was $5,000,000. If from this is taken $1,048,864.14 ore in transit, for which money was received within a short time, the actual value made upon the mining p roperties was only $3,951,131.86, and at the time such sale was made, the mine was paying 75 per cent of this in net earnings per annum and according to the testimony of the appellee's expert, Burbridge, there was ore sufficient to last ten years.

(s) The company owned mining property, cash on hand and ore in transit to the amount of $3,433,917.00, almost as much as the value placed upon the mine and all the property.

(t) Assuming the estimate of appellee's witness, Burbridge, to be correct—that there was remaining in the mint 1,575,600 tons of ore and that the average net profit per ton for the next 16 years would equal that of the past 16, to-wit: $7.29 per ton—the value of the mine and allowing discounts according to Burbridge's theory, including incendental property, cash on hand and ore in

transit, would be $11,861,052.00; or, taking the same estimate and valuing the net profits at $5.33 per ton, being the average value of the ore sold during the times of lowest and almost level prices—from 1908 to 1915, inclusive— the value of the property would be $9,696,052; or, taking the net value of the ore to be the lowest price abtained, to-wit: about $3.00, net, per ton, the value of the property woul be approximately $8,000,000.

(u) The estimated depth of the ore, from the Hummingbird tunnel of No. 5 level, is 1900 feet, and the time within which it will take to remove it, is 9 4-10 years.

(v) During 1913, 1914 and 1915, lead was at the lowest average price and during the same time silver was at its lowest price for the 16 years in which the mine had been operated, but during said time the mining facilities had been bettered so that the average net profit, notwithstanding the low, level prices, was $7.00 per ton, and based upon this value, the mine was worth $11,067,039.00, allowing for discounts upon Burbridge's theory.

XI.

It appearing that all of the facts set out in Paragraph 10 were taken from the testimony of the defendants or deducted therefrom, it was error for the court to hold that appellees had clearly shown that the mine and properties in question (at that time paying a net profit of approximately $3,000,000 per year, or nearly 75 per cent of the estimated value; that the life of the mine was estimated by defendants at 9 4-10 years) were not worth more than $5,000,000 when there was about $1,050,000.00 ore in

transit which had been sold and cash collected therefor within a few days.

XII.

It is respectfully submitted that a new hearing should be granted.

Etienne du P Bergere
Carlsbad, New Mexico

Charles R Brice
Roswell, New Mexico

Solicitors for the Appellent

STATE OF NEW MEXICO,
COUNTY OF CHAVES

I, Charles R. Brice, one of the solicitors for the appellant in the foregoing entitled and numbered cause, have prepared this Motion for Rehearing, and I certify that in my judgment it is well founded and that it is not interposed for delay.

Charles R Brice
Solicitor for Appellant

No. 3276

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALRA G. FARRELL, SUBSTITUTED FOR BELDON M. DELANY,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Appellees.

Transcript of the Record

Upon appeal from the United States District Court for the District of Idaho, Northern Division.

CAPITAL NEWS PUBLISHING CO., BOISE

No.....

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALRA G. FARRELL, SUBSTITUTED FOR BELDON M. DELANY,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Appellees.

Transcript of the Record

Upon appeal from the United States District Court for the District of Idaho, Northern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

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Spokane, Washington,
For Northern Pacific Railway Co.

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In the District Court of the United States for the District of Idaho, Northern Division.

ALRA G. FARRELL, SUBSTITUTED FOR BELDON M. DELANEY,

Plaintiff,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Defendants.

No. 660.

STIPULATION.

It is hereby stipulated and agreed by and between counsel for the respective parties to the above entitled action, that Alra G. Farrell, plaintiff herein, may serve and file herein, unless objection thereto is made by the Court, her amended complaint hereto attached, which amended complaint shall supersede the original complaint herein for all purposes of this action.

Dated this 16th day of October, 1917.

A. H. KENYON,
S. M. STOCKSLAGER,
Attorneys for Plaintiff.

STILES W. BURR,
SKUSE & MORRILL,
Attorneys for Edward Rutledge Timber Company, Defendant.

CANNON & FERRIS,
Attorneys for Defendant Northern Pacific Railway Company.

Approved,
Dietrich, Judge.
Oct. 31, 1917.

(Title of Court and Cause.)

No. 660.

AMENDED COMPLAINT.

Plaintiff complains of the defendants and alleges:

I.

That the defendant Edward Rutledge Timber Company, is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in the City of Spokane, Washington, and is a citizen of the State of Washington.

II.

That at all times herein mentioned the Northern Pacific Railway Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of the State of Wisconsin.

III.

That at all times herein mentioned Beldon M. Delany was and until the time of his death a citizen of the United States, over the age of twenty-one years, and a citizen and resident of the State of Idaho, residing upon the land hereinafter described, in Sho-

shone County, Idaho, and at all of said times was duly qualified to enter and acquire title to one hundred and sixty acres of land, more or less, under the homestead laws of the United States.

IV.

That on or about the 1st day of April, 1901, one W. B. Leach located and settled upon the Northeast Quarter (NE¼) of Section Twenty (20), Township Forty-three (43), North, Range Four (4) E. B. M., then unsurveyed public lands of the United States, situated in the County of Shoshone, and State of Idaho, and within the Coeur d'Alene Land District, with the intention of then establishing and continuously thereafter maintaining his home thereon, and with the intention of entering same under the homestead laws of the United States when the said land should have been duly surveyed and open to entry under said laws, and thereafter continuously resided upon said land, cultivated and improved the same to and until the 21st day of June, 1903; that on or about the 21st day of June, 1903, Beldon M. Delany herein having purchased and secured the possessory right and right of possession of the said W. B. Leach in and to the land and premises hereinbefore described, located and settled and established his home thereon with the intention of thereafter maintaining his home thereon with the intention of entering the same under the homestead laws of the United States when the said land should have been duly surveyed and open to entry under said laws, and from said time until the date of his death, continuously re-

sided upon said land, cultivated and improved the same.

V.

That at the time of the location and settlement of the said W. B. Leach and Beldon M. Delany upon the land above described, the same was vacant, unoccupied and unsurveyed public lands of the United States, and no claim or right of title to or interest in the said lands and premises or any part thereof had then been made by any person, persons or corporations whomsoever, nor was there any evidence whatsoever upon the said lands and premises or any part or parcel thereof, nor in the United States Land Office for the District in which said land was situated, to-wit: The Coeur d'Alene District, nor in the General Land Office at Washington, D. C., showing any right, title, or interest by, of or for any person, persons or corporations whomsoever to the said lands and premises or any part or parcel thereof, nor were there any marks, blazes, notices or other evidence whatsoever of the location, selection, claim or possession of the said premises located or traced upon the ground, or upon or near the same or any part thereof, nor had the boundaries thereof been traced or located by reference to any natural objects or permanent monuments, or marked or located by any monument of any kind or character whatsoever, and no person had prior to the location and settlement of the said W. B. Leach and Beldon M. Delany upon said lands, nor since said settlement and to date hereof, ever entered upon the same or attempted

to locate or reside thereon, nor any part or parcel thereof.

VI.

That on or about the 5th day of July, 1901, the Governor of the State of Idaho for and on behalf of the State of Idaho, duly made and filed with the United States Surveyor General for the State of Idaho the application of said State for the survey of Township 43 North, Range 4, E. Boise Meridian, (with other lands) and thereafter and on or about the 8th day of July, 1901, duly filed said application with the Commissioner of the General Land Office pursuant to the Act of August 18th, 1894, for the purpose of withdrawing the said lands from settlement or appropriation and of securing to said State the preference right of selection of said lands as provided by the terms of said Act and thereafter duly caused notice thereof to be published in the manner provided by said Act. That upon the filing of said application the said lands became and were withdrawn from the public domain and reserved from appropriation and were not subject to entry or appropriation by any person or corporation other than the State of Idaho to and until sixty (60) days from the date of the filing of Township plat of survey in the proper District Land Office.

VII.

That on the 4th day of June, 1909, the official plat of survey of the land and premises hereinbefore described was filed in the local land office at Coeur d'Alene City, Idaho, and on said date said lands first

became open for entry under the homestead laws of the United States, and on said date the said Beldon M. Delany duly made application to enter said lands in the manner and form required by law under the homestead laws of the United States, which said application was rejected by the local land office on the ground and for the reason only that the said application was in conflict with the selection theretofore made by the State of Idaho for indemnity school purposes, and with lieu selection list No. 71 theretofore made by the Northern Pacific Railway Company under the Act of March 2nd, 1899.

VIII.

That thereafter Beldon M. Delany appealed from said decision and ruling of the land office, and thereafter and on July 9th, 1915, the Commissioner of the General Land Office held that said Beldon M. Delany had no right to enter the said lands under the homestead laws of the United States upon the date of his alleged settlement, nor at the time he filed application to enter the same under the homestead laws of the United States, for the reason that the said lands had been duly selected by the Northern Pacific Railway Company, defendant herein.

IX.

That thereafter the said Beldon M. Delany duly appealed from the said decision of the Commissioner of the General Land Office to the Department of the Interior in the manner required by law, and thereafter and on the 18th day of November, 1915, the Department duly affirmed the decision of the Com-

missioner of the General Land Office so appealed from as aforesaid, and remanded the case with directions that Delany's application to enter be finally rejected upon the ground and for the reason that Delaney's application to enter the land under the homestead laws of the United States was based upon a settlement not made until after the Northern Pacific Railway Company had filed its selection list No. 71, Coeur d'Alene 02484 for the same land under the Act of March 2nd, 1899.

X.

That thereafter said Beldon M. Delany duly filed a motion for re-hearing of the decision last above mentioned, and thereafter and on the 29th day of January, 1916, the motion for re-hearing of said matter was denied on the grounds hereinbefore set forth, and thereafter said Beldon M. Delany duly filed a petition for the exercise of the supervisory power of the Hon. Secretary of the Interior to vacate and recall departmental decisions of November 18th, 1915, and January 29th, 1916; that thereafter the Hon. Secretary of the Interior denied said petition of Beldon M. Delany on the ground that prior to the settlement of Beldon M. Delany the Northern Pacific Railway Company had duly selected the lands under the act of March 2nd, 1899, and that notwithstanding that the said Northern Pacific Railway Company had in its lieu selection list No. 71, described the said lands in terms of future survey when made, and the case was finally closed.

XI.

That on the 23rd day of July, 1901, the Northern Pacific Railway Company filed with the General Land Office its selection list No. 71, which said list contained the following pretended description, to-wit:

> "Lands, which when surveyed, will be the Northeast Quarter of Section 20, Township 43 North, Range 4, E. B. M."

That at the time of filing said selection list No. 71 said pretended description was wholly imaginary, and no lands in the State of Idaho or elsewhere were or could be so designated or described, for the reason that at the time of filing same as aforesaid, no survey had been made or attempted, nor were there any surveyed lands in such close proximity thereto as to render such description and designation of said lands definite or certain or capable of being made definite or certain by any reasonable manner or in any other manner or at all, save and except the making of an official survey by the proper officers of the United States.

XII.

That neither the said Northern Pacific Railway Company, or any of its servants, agents, attorneys, or employees knew or pretended to know what lands were referred to in said pretended description, nor did said defendant then know that in the event of a survey thereafter that said pretended description would be applied to the lands and premises now oc-

cupied and claimed by this plaintiff as aforesaid, and which said pretended description was the sole and only description contained in said lieu selection list No. 71, and which said description was then and is wholly insufficient to locate and describe the lands and premises hereinbefore described and located and settled upon by said Beldon M. Delany as hereinbefore alleged, or any part or parcel thereof, or any land in the State of Idaho or elsewhere, for want of which description the said lieu selection list No. 71, and the selection of the said lands by the Northern Pacific Railway Company was and is wholly void and of no force or effect whatsoever.

XIII.

That at the time of the filing of said lieu selection list No. 71 by the said Northern Pacific Railway Company as aforesaid the said lands had been theretofore duly appropriated by the State of Idaho and at said time were withdrawn from the public domain and were not open to selection or appropriation by the Northern Pacific Railway Company under the Act of March 2nd, 1899, or in any manner or at all, and by reason of the making and filing of the prior application of the State of Idaho of the lands as hereinbefore alleged, the attempted selection thereof by the Northern Pacific Railway Company was void and of no force or effect.

XIV.

That thereafter and on the 16th day of June, 1916, letters patent to said land were issued to the

Northern Pacific Railway Company, a corporation, defendant herein.

XV.

Plaintiff is informed and believes, and therefore alleges the fact to be, that subsequent to the 16th day of June, 1916, and prior to the commencement of this action, the Northern Pacific Railway Company, a corporation, transferred and caused to be transferred to the defendant Edward Rutledge Timber Company, a corporation, all of its right, title and interest in and to the lands and premises hereinbefore described, and the said Edward Rutledge Timber Company, a corporation, now claims to be the owner of the legal title of the land and premises above described.

XVI.

That neither the said Northern Pacific Railway Company, a corporation, or the said Edward Rutledge Timber Company, a corporation or any agent, servant, attorney, or employee whomsoever or either of said defendants have ever been in possession of the said land and premises or any part or parcel thereof, but the possession thereof since the 1st day of April, 1901, has been and is now in this plaintiff and her predecessor in interest to the exclusion of all other person, persons, or corporation whomsoever; that neither of said defendants have ever complied with the laws of the United States so as to entitle them or either of them to claim any interest in or right or title to the said lands and premises or any part or parcel thereof as against this plaintiff..

XVII.

That the action and decision of the local land office rejecting the application of Beldon M. Delany to enter upon the land and premises hereinbefore described under the homestead laws of the United States on the 4th day of June, 1909, was and is contrary to law, and in violation of the rights of this plaintiff, and the approval of said decision rejecting said application of the said Beldon M. Delany by the Commissioner of the General Land Office, and the approval thereof by the Secretary of the Interior, were and are wrongful and unlawful and based upon an erroneous construction of the law, and upon a statement of facts upon and concerning which there was and is no conflict.

XVIII.

That long prior to the said 16th day of June, 1916, and on said date, and at the time of the issuance of the patent to the Northern Pacific Railway Company, a corporation, to the land and premises herein described, said Beldon M. Delany was and at all times since has been and at the time of the commencement of this action was, the owner and lawfully entitled to a patent for the legal title to said premises and each and every part thereof.

XIX.

That each and every, all and singular of the acts of the defendants herein and each of them of and concerning their attempted selection and claim in and to said land and premises, and all the acts and proceedings of the Commissioner of the General

Land Office and the Secretary of the Interior in connection therewith, and in the issuance of said patent are and were contrary to and without authority at law, and in violation of the rights of this plaintiff, and that at the time of the pretended initiation of said claim on the part of the Northern Pacific Railway Company, in and to said lands and premises, the said Northern Pacific Railway Company was wholly without any right or authority at law to select or claim the said land or any part thereof.

XX.

That subsequent to the commencement of this action the said Beldon M. Delany, the party instituting this suit as plaintiff, herein, died, leaving him surviving as his sole and only heirs at law three sisters and one brother, and that all of said heirs have conveyed all of their right, title and interest in and to the said premises herein described to Alra G. Farrell, one of said heirs. That the said Alra G. Farrell is now the only party interested in said land and premises and the sole and only person in interest as plaintiff in this action.

WHEREFORE, plaintiff prays that if she be adjudged and decreed to be the owner of the lands and premises herein described and entitled to the possession thereof, and in the possession thereof, and that the defendants and each of them be decreed to hold such title as they may possess under the patent of the United States in and to said premises in trust for this plaintiff, and for the sole use and behoof of

this plaintiff, and that they be decreed to convey the same to this plaintiff by proper deed of conveyance and that the title thereto be forever quieted in this plaintiff, and for her costs and disbursements in this action expended, and for such other and further relief in the premises as to the Court may seem equitable and just.

A. H. KENYON,
S. M. STOCKSLAGER,
Solicitors for Plaintiff.

(Duly verified).
Endorsed, Filed Oct. 30, 1917.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 660.

ANSWER OF DEFENDANT NORTHERN PACIFIC RAILWAY COMPANY TO AMENDED BILL OF COMPLAINT.

Comes now the defendant, Northern Pacific Railway Company, and for its answer to the amended bill of complaint of the substituted plaintiff Alra G. Farrell, says:

1. This defendant admits that it is and was at all the times mentioned in the amended bill of complaint (hereinafter, for brevity, referred to as "the bill") a corporation organized and existing under the laws of the State of Wisconsin; and alleged that previous to the times mentioned in the bill this defendant had in all things duly complied with all the conditions and requirements of the constitution and

laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. This defendant admits that the defendant, Edward Rutledge Timber Company, is and was at all times mentioned in the bill a corporation organized and existing under the laws of the State of Washington, with its principal place of business in the City of Spokane in said State; and on information and belief alleges that previous to the times mentioned in the bill the defendant Edward Rutledge Timber Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. This defendant has no knowledge or information sufficient to form a belief as to whether, at any of the times mentioned in the bill or at the time of his death Beldon M. Delaney was a citizen of the United States, or was over the age of twenty-one years, or was qualified to enter or acquire title to

one hundred sixty (160) acres of land, more or less, under the homestead laws of the United States; or as to whether said Delaney ever resided upon the land described in the bill.

4. This defendant has no knowledge or information sufficient to form a belief as to whether W. B. Leach, named in the bill, located or settled upon the land described in the bill, viz: the Northeast quarter of Section 20, in Township 44 North, Range 4 East, B. M., or upon any part thereof, on or about the first day of April, 1901, or at any other time; or as to whether, if said Leach ever located or settled on said land, he did so with the intention of establishing or maintaining his home thereon, or with the intention of entering the same under the homestead laws of the United States; or as to whether he thereafter continuously or otherwise resided upon said land or cultivated or improved the same.

5. This defendant admits that the approved township plat of survey of the township in which the land described in the bill is situated, was not filed in the United States District Land Office at Coeur d'Alene, Idaho, which is the District in which said land is located, until the fourth day of June, 1909, and that until said date said land was unsurveyed; but alleges that long prior to said date the said land had been surveyed in the field by the official surveyors of the United States under the direction of the Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly

and plainly marked upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office according to law; and that the lines of survey so traced and marked are identical with the lines of survey shown on the township plat of survey filed as aforesaid.

6. This defendant has no knowledge or information sufficient to form a belief as to whether said Delaney acquired or purchased any alleged right or rights of said Leach, possessory or otherwise, in or to said land, or whether said Delaney ever located or settled on said land or established his home thereon, or whether if said Delaney ever located or settled on said land, he did so with the intention of thereafter maintaining his home thereon or with the intention of entering the same under the homestead laws of the United States, or whether he thereafter, continuously or otherwise, resided upon said land or cultivated or improved the same or was residing thereon at the time of his death. And this defendant further specifically denies each and every allegation contained in paragraph 4 of the bill.

7. This defendant admits and alleges that on and prior to the first day of April, 1901, and at all times thereafter until the twenty-third day of July, 1901, the said land was vacant, unoccupied and unsurveyed public land of the United States, and that no claim, right or title to or interest in the said land or any part thereof had attached or been initiated

by any person or corporation whomsoever; but denies that at any time after the twenty-third day of July, 1901, the said land was vacant, unoccupied or unappropriated public land of the United States, or free from claim, right or title; and denies that at the time of the alleged location or settlement thereon by said Delaney or at any time after the twenty-third day of July, 1901, there was no evidence upon the said land or in the United States Land Office for the district in which said land was situated, to-wit: in the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., to show that said land was claimed by this defendant, or by the defendant Edward Rutledge Timber Company, or that the boundaries of said land had not then been traced, marked or located by monuments, or that there were no marks, blazes, notices or other evidences of the location, selection, claim or possession of said land located or traced upon the ground; and this defendant alleges that, on the contrary, the said land was at all times subsequent to the twenty-third day of July, 1901, segregated from the public domain and appropriated by the selection thereof made by the defendant Railway Company as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim, or open to settlement by said Delaney or any other person, under the homestead laws of the United States or otherwise; that the fact of such selection, appropriation and segregation was a matter of record and ap-

peared upon the fact of the records of the said United States District Land Office at Coeur d'Alene, Idaho, and upon the face of the records of the General Land Office at Washington, D. C., the same being the usual, proper and only legal records upon which such selection, appropriation and segregation could appear; that at the time said Delaney first went upon said land, and at the time of his alleged location and settlement thereon, and at all times thereafter, said Delaney had full knowledge and notice of the selection of said land by the defendant Railway Company as hereinafter set forth, and of the segregation and appropriation of said land by virtue of such selection; that said Delaney went upon said land and made his alleged settlement thereon, and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of the defendant Railway Company's prior selection thereof, and of the defend- and Edward Rutledge Timber Company's right thereunder, and in the hope that the claim of these defendants to the land might be defeated upon technical grounds, and that he, said Delaney, might acquire said land and the valuable timber thereon for purposes of speculation.

8. This defendant denies that said Delaney ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavor in good faith or otherwise, to comply with the homestead laws of the United States, or to acquire the

said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that said Delaney went upon the same and endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

9. This defendant admits that at some time subsequent to the 5th day of July, 1901, the Governor of the State of Idaho attempted to make an application, under the Act of Congress approved August 18th, 1894, for the survey of the township mentioned in paragraph 6 of the bill and a large number of other townships in the State of Idaho. But this defendant denies that such application, or purported application, was duly made, or made in accordance with the provisions of said act; and denies that such purported application was made to the Commissioner of the General Land Office, as required by the terms of said act; and denies that said purported application was made on or about the 5th day of July, 1901, or was filed in the office of the Commissioner of the General Land Office on or about the 8th day of July, 1901; and denies that the said Governor, or any other person, thereafter, duly or otherwise, caused notice thereof to be published in the manner provided by said act; and denies that upon the filing of said purported application the lands

described therein, or any thereof, became or were withdrawn from the public domain, or reserved from appropriation, or were not subject to entry or appropriation by any person or corporation other than the State of Idaho, to and until sixty (60) days from the date of the filing of the township plat of survey, or for any other period of time whatsoever.

10. This defendant alleges that at some time after the 5th day of July, 1901, the then Governor of the State of Idaho made and signed a writing purporting to be an applibation, under the said Act of August 18, 1894, for the survey of the townships referred to in the last preceding paragraph of this answer, which purported application was addressed to the Surveyor General for the State of Idaho and to the Commissioner of the General Land Office, and was by said Governor or at his instance, filed in the office of the Surveyor General at Boise, Idaho; that said Surveyor General thereafter transmitted said purported application to the Commissioner of the General Land Office, by mail, and the same was received in the office of the Commissioner of the General Land Office on or after, and not before, the 15th day of July, 1901; that after the receipt of said purported application the Commissioner of the General Land Office duly considered the same and held and decided that such application was excessive, improvident, illegal, and without effect, and that the same was not entitled to be recognized or allowed, and ordered that the same be rejected; that the said Gover-

nor was duly notified of such action by the Commissioner of the General Land Office; that no appeal from said order and decision of the said Commissioner, nor any motion *of* other action for the review, reversal or modification of the same, was ever taken by or on behalf of the State of Idaho; that said order and decision of said Commissioner was never revoked, modified or set aside, but at all times remained in force and effect; that the Commissioner of the General Land Office never gave notice to the Surveyor General, as required by the provisions of said Act of August 18, 1894, of the said purported application; and never, at any time prior to the month of January, 1905, gave notice to the Local Land Office of any of the districts in which the townships described in said application were situated, or to the Local Land Office at Coeur d'Alene, Idaho, of the said application or of the reservation of said townships, or any of them, as required by said act; that said purported application was wholly void and without effect; and that the Commissioner of the General Land Office and the Secretary of the Interior, in the proper exercise of the authority vested in each of them by law, have frequently and in a number of cases held that said purported application was and is illegal, void and without effect, and inoperative to effect a reservation or withdrawal of the townships therein described, or of any land situated in either of said townships, or to create any preference or other right in the State of Idaho, or to continue or create an obstacle to the selection or

other appropriation of any land in either of said townships by the defendant Railway Company, or any other person or corporation, or to any other claim to any of said lands under the public land laws of the United States, initiated or attaching prior to the filing of the township plat of survey of any such township. This defendant further alleges that the State of Idaho never made any valid selection or application to select the land described in the bill, or any part thereof, either before or after filing of the township plat of survey; and that the State of Idaho does not now claim or assert any right, title or interest in or to the said land or any part thereof.

11. This defendant alleges that on the 23rd day of July, 1901, the land described in the bill was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by the defendant Railway Company, as its successor, and was then being operated by the defendant Railway Company; that said land was so classified as non-mineral at the time of actual Government survey; that on said 23rd day of July, 1901, the defendant Railway Company by its selection list No. 71, duly made selection of the said land under the provisions of the Act of Congress entitled "An Act to set aside

a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations, and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

12. This defendant alleges that on the 4th day of June, 1909, the official township plat of the survey of the township in which said land is situated, was filed in the said United States Land Office at Coeur d'Alene, Idaho, and that on said last men-

tioned date and within the time specified in said Act of Congress, the defendant Railway Company caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 5 of said Act, a new selection list embracing the selections embraced in the said selection list of July 23, 1901, including the selection of the land described in the bill describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and pracice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

13. This defendant admits that the said selection list No. 71 described the said land in the manner alleged in said bill, but alleges that said list was so filed in the United States Land Office at Coeur d'Alene, Idaho, and not in the General Land Office.

14. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the description of said land contained in said selection list was imaginary, or that no land in the State of Idaho or elsewhere was or could be so designated or described, whether for the reason stated in the bill or otherwise; and denies that at that time there were no surveyed lands in such proximity to the lands so selected as to render such description and designation definite or certain, or capable of

being made definite or certain, in any reasonable manner, or save and except by the making of an official survey by the proper officers of the United States; and denies that neither the defendant Railway Company nor any of its servants, agents, attorneys or employees knew or pretended to know what lands were referred to by such description, or that the defendant Railway Company did not then know that upon survey, such description would be applied to the land described in said bill; and denies that the description contained in said selection list was insufficient to designate, locate or describe the land so selected, or that the said selection was by reason of insufficiency of description or otherwise, void or of no force or effect; but alleges that, on the contrary, in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said Act.

15. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the land described in the bill, or any part thereof, had theretofore been duly or otherwise appropriated by the State of Idaho, or at said or any other time was withdrawn from the public domain (except by virtue of such selection by defendant Railway Company); and denies that the same was

not then open to selection or appropriation by the defendant Railway Company under said act of March 2, 1899, or in any manner, or at all; and denies that by reason of the making and filing of the said or any application or purported application of the State of Idaho for the survey of the said land, as alleged in the bill or otherwise, the said selection thereof by the defendant Railway Company was void or of no force or effect.

16. This defendant admits and alleges that shortly after the township plat of survey was filed in said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, but on the 10th day of June, 1909, and not on the 4th day of June, 1909, as alleged in the bill, said Delaney tendered to the Register and Receiver of said Land Office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but this defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by said Delaney in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver in so rejecting such

application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of said Delaney or of the plaintiff; and this defendant further denies that the decisions of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

17. This defendant alleges that neither in the proceedings in the said Coeur d'Alene Land Office, nor in the General Land Office, nor before the Secretary of the Interior upon the said application of said Delaney to enter said land, nor otherwise in connection with the same, was it ever at any time or in any manner claimed or asserted by or on behalf of said Delaney, or by any other person, that the alleged claim or rights of said Delaney rested upon anything which had occurred prior to his alleged settlement on said land on June 21, 1903, or upon the alleged settlement and location thereon by said Leach, or that any claim or right of any kind whatsoever had attached or been initiated to said land prior to the selection thereof by the defendant Railway Company on July 23, 1901, or that at the time of the selection of said land by the defendant Railway company on July 23, 1901, the same was not then vacant and

unappropriated public land of the United States subject to such selection.

18. This defendant alleges that the said selection so made by the defendant Railway Company of the land described in the bill, and the said selection lists so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in the bill, a patent of the United States conveying the said land to the defendant Railway Company was duly issued, granted and delivered to the defendant Railway Company in accordance with law.

19. This defendant admits that it has conveyed the premises to the Edward Rutledge Timber Company, and alleges that said conveyance bears date July 17, 1916, and was made in pursuance of a contract between this defendant and said Edward Rutledge Timber Company dated October 5, 1903, whereby for valuable consideration paid to it by said defendant Edward Rutledge Timber Company, this defendant sold the land to said Edward Rutledge Timber Company and agreed and understook to convey the same; and this defendant admits that said Edward Rutledge Timber Company now claims to be the owner of the legal title to said land.

20. This defendant denies that neither the defendant Railway Company nor the defendant Ed-

ward Rutledge Timber Company, nor any agent, servant, attorney or employee of either of said defendants, have ever been in possession of said land or any part thereof; and denies that the plaintiff or said Delaney or his alleged predecessor in interest have been in possession of said land since the first day of April, 1910, to the exclusion of all other persons or corporations, or at all; and denies that the defendants have not complied with the laws of the United States so as to entitle them to claim said land as against said Delaney or the plaintiff; but alleges that, on the contrary, the defendant Railway Company has, in all respects, complied with all the laws of the United States and with the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office; and that by virtue of matters hereinbefore set forth the defendant Railway Company became and was entitled to the said land and entitled to receive patent therefor.

21. This defendant denies that any of the acts of proceedings of the defendant Railway Company concerning the said selection, or any of the acts or proceedings of the officers of the said Coeur d'Alene Land Office, or of the Commissioner of the General Land Office, or of the Secretary of the Interior in connection therewith, or in the issuance of patent to the defendant Railway Company as aforesaid are or were contrary to or without authority of law, or in violation of any rights of said Delaney or of the plaintiff; and denies that the rejection of said Delaney's said

application was wrongful or unlawful, or in violation of any right of said Delaney or of the plaintiff, or based upon an erroneous construction of the law, or upon a statement of facts concerning which there was and is no conflict; and alleges that all the acts and proceedings of the defendant Railway Company and of the officers of said Coeur d'Alene Land Office and of the Commissioner of the General Land Office and of the Secretary of the Interior in rejecting and confirming the rejection of said Delaney's said application and in approving the selection of said land by the defendant Railway Company and in issuing patent to it, were right and proper and in accordance with law.

2. This defendant denies that on the 16th day of June, 1916, or at the time of issuance of patent to the defendant Railway Company as aforesaid, or at any other time whatsoever, said Delaney or the plaintiff was the owner of said land or the holder of the legal title thereto or entitled to patent for the same; and denies that said Delaney or his heirs or other successors in interest or the plaintiff has or have now, or ever had, any right, title or interest whatsoever in or to the said land or any part thereof; and alleges that by virtue of its selection of the said land as hereinbefore set forth, and by virtue of the patent issued to it as aforesaid, the defendant Railway Company became and was the owner of said land in fee simple, free from any claim, right, title or interest of said Delaney or of the plaintiff or any other person whomsoever, except the defendant Edward Rutledge Tim-

ber Company; and that by virtue of the conveyance of said land by the defendant Railway Company, the defendant Railway Company, the defendant Edward Rutledge Timber Company became and it now is the owner of said land and all thereof in fee simple, free from any claim, right, title or interest of said Delaney or of the plaintiff or any other person whomsoever, except the defendant Edward Rutledge Timber Company; and that by virtue of the conveyance of said land by the defendant Railway Company, the defendant Edward Rutledge Timber Company became and it now is the owner of said land and all thereof in fee simple, free from any claim, right, title or interest to or in the same on the part of said Delaney or the plaintiff or any other person whomsoever.

23. Defendant admits that said Beldon M. Delaney, the party instituting this suit as plaintiff, died susequent to the commencement of this suit but this defendant has no knowledge or information sufficient to form a belief as to whether said Delaney died testate or intestate, or as to whether he left any heirs at law; or as to who the heirs of said Delaney, if any, were or are; or as to whether the plaintiff, Alra G. Farrell, was or is an heir of said Delaney; or as to whether any heir of said Delaney has assigned, conveyed, or otherwise transferred to said plaintiff his supposed right, title or interest in the land described in the bill, or any thereof; or as to whether said plaintiff has in any manner acquired or succeeded to the supposed rights or interests in said land, or any

thereof, asserted or claimed by said Delaney.

WHEREFORE, this defendant prays that it be hence dismissed, with costs.

NORTHERN PACIFIC RAILWAY COMPANY.

By R. H. RELF,

(Corporate Seal) Assistant Secretary.

CHAS. W. BUNN,
CANNON & FERRIS,
GRAFTON MASON,
Solicitors and of Counsel for Defendant, Northern Pacific Railway Co.

(Duly verified)

Endorsed, Filed Oct. 31, 1917.
W. D. McReynolds, Clerk,
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 660.

ANSWER OF DEFENDANT EDWARD RUTLEDGE TIMBER COMPANY TO AMENDED BILL OF COMPLAINT.

Comes now the defendant Edward Rutledge Timber Company, and for its answer to the amended bill of complaint of the substituted plaintiff, Alra G. Farrell, says:

1. This defendant admits that it is and was at all times mentioned in the amended bill of complaint (hereinafter, for brevity, referred to as "the bill") a corporation organized and existing under the laws of the State of Washington, with its principal office

and place of business in the City of Spokane in said State; and alleges that previous to the times mentioned in the bill this defendant had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. This defendont admits that the defendant Northern Pacific Railway Company is and was at all the times mentioned in the bill a corporation organized and existing under the laws of the State of Wisconsin; and on information and belief alleges that previous to the times mentioned in the bill the defendant Northern Pacific Railway Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. This defendant has no knowledge or information sufficient to form a belief as to whether, at any of the times mentioned in the bill or at the time of his

death, Belden M. Delaney was a citizen of the United States, or was over the age of twenty-one years, or was qualified to enter or acquire title to one hundred sixty (160) acres of land, more or less, under the homestead laws of the United States; or as to whether said Delaney ever resided upon the land described in the bill.

4. This defendant has no knowledge or information sufficient to form a belief as to whether W. B. Leach, named in the bill, located or settled upon the land described in the bill, viz: the Northeast quarter of Section 20, in Township 43 North, Range 4 East B. M., or upon any part thereof, on or about the first day of April, 1901, or at any other time; or as to whether, if said Leach ever located or settled on said land, he did so with the intention of establishing or maintaining his home thereon, or with the intention of entering the same under the homestead laws of the United States; or as to whether he thereafter continuously or otherwise resided upon said land or cultivated or improved the same.

5. This defendant admits that the approved township plat of survey of the township in which the land described in the bill is situated, was not filed in the United States District Land Office at Coeur d'Alene, Idaho, which is the District in which said land is located, until the fourth day of June, 1909, and that until said date said land was unsurveyed; but alleges that long prior to said date the said land had been surveyed in the field by the official surveyors of the United States under the direction of the

Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly and plainly marked upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office according to law; and that the lines of survey so traced and marked are identical with the lines of survey shown on the township plat of survey filed as aforesaid.

6. This defendant has no knowledge or information sufficient to form a belief as to whether said Delany acquired or purchsed any alleged right or rights of said Leach, possessory or otherwise, in or to said land, or whether said Delaney ever located or settled on said land or established his home thereon, or whether if said Delany ever located or settled on said land, he did so with the intention of thereafter maintaining his home thereon, or with the intention of entering the same under the homestead laws of the United States, or whether he thereafter, continuously or otherwise, resided upon said land or cultivated or improved the same or was residing thereon at the time of his death. And this defendant further specifically denies each and every allegation contained in paragraph 4 of the bill.

7. This defendant admits and alleges that on and prior to the first day of April, 1901, and at all times thereafter until the twenty-third day of July, 1901, the said land was vacant, unoccupied and un-

surveyed public land of the United States, and that no claim, right or title to or interest in the said land or any part thereof had attached or been initiated by any person or corporation whomsoever; but denies that at any time after the twenty-third day of July, 1901, the said land was vacant, unoccupied or appropriated public land of the United States, or free from claim, right or title; and denies that at the time of the alleged location or settlement thereon by said Delany or at any time after the twenty-third day of July, 1901, there was no evidence upon the said land or in the United States Land Office, for the district in which said land was situated, to-wit: in the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., to show that said land was claimed by the defendant Railway Company or by this defendant, or that the boundaries of said land had not then been traced, marked or located by monuments, or that there were no marks, blazes, notices or other evidences of the location, selection, claim or possession of said land located or traced upon the ground; and this defendant alleges that, on the contrary, the said land was at all times subsequent to the twenty-third day of July, 1901, segregated from the public domain and appropriated by the selection thereof made by the defendant Railwy Company as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim, or open to settlement by said Delany or any other person, under the homestead laws of the

United States or otherwise; that the fact of such selection, appropriation and segregation was a matter of record and appeared upon the face of the records of the said United States District Land Office at Coeur d'Alene, Idaho, and upon the face of the records of the General Land Office at Washington D. C., the same being the usual, proper and only legal records upon which such selection, appropriation and segregation could appear; that at the time said Delany first went upon said land, and at the time of his alleged location and settlement thereon, and at all times thereafter, said Delaney had full knowledge and notice of the selection of said land by the defendant Railway Company as hereinafter set forth, and of the segregation and appropriation of said land by virtue of such selection; that said Delany went upon said land and made his alleged settlement thereon, and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of the defendant Railway Company's prior selection thereof, and of this defendant's right thereunder, and in the hope that the claim of these defendants to the land might be defeated upon technical grounds, and that he, said Delany, might acquire said land and the valuable timber thereon for purposes of speculation.

8. This defendant denies that said Delany ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavored in good faith or otherwise, to comply with the

homestead laws of the United States, or to acquire the said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that said Delany went upon the same and endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

9. This defendant admits that at some time subsequent to the 5th day of July, 1901, the Governor of the State of Idaho, attempted to make an application, under the Act of Congress approved August 18th, 1894, for the survey of the township mentioned in paragraph 6 of the bill and a large number of other townships in the State of Idaho. But this defendant denies that such application, or purported application, was duly made, or made in accordance with the provisions of said act; and denies that such purported application was made to the Commissioner of the General Land Office, as required by the terms of said act; and denies that said purported application was made on or about the 5th day of July, 1901, or was filed in the office of the Commissioner of the General Land Office on or about the 8th day of July, 1901; and denies that the said Governor, or any other person, thereafter, duly or otherwise, caused notice thereof to be published in the manner provided by said act; and denies that upon the filing

of said purported application the lands described therein, or any thereof, became or were withdrawn from the public domain, or reserved from appropriation, or were not subject to entry or appropriation by any person or corporation other than the State of Idaho, to and until sixty (60) days from the date of the filing of the township plat of survey, or for any other period of time whatsoever.

10. This defendant alleges that at some time after the 5th day of July, 1901, the then Governor of the State of Idaho made and signed a writing purporting to be an application, under the said Act of August 18th, 1894, for the survey of the townships referred to in the last preceding paragraph of this answer, which purported application was addressed to the Surveyor General for the State of Idaho and to the Commissioner of the General Land Office and was by said Governor, or at his instance, filed in the office of the Surveyor General at Boise, Idaho; that said Surveyor General thereafter transmitted said purported application to the Commissioner of the General Land Office, by mail, and the same was received in the office of the Commissioner of the General Land Office on or after, and not before, the 15th day of July, 1901; that after the receipt of said purported application the Commissioner of the General Land Office duly considered the same and held and decided that such appliction was excessive, improvident, illegal, and without effect, and that the same was not entitled to be recognized or allowed, and ordered that the same be rejected; that the said Gov-

ernor was duly notified of such action by the Commissioner of the General Land Office; that no appeal from said order and decision of the said Commissioner, nor any motion or other action for the review, reversal or modification of the same was ever taken by or on behalf of the said Governor, or any other person, or by or on behalf of the State of Idaho; that said order and decision of said Commissioner was never revoked, modified or set aside, but at all times remained in force and effect, that the Commissioner of the General Land Office never gave notice to the Surveyor General, as required by the provisions of said act of August 18th, 1894, of the said purported application; and never, at any time prior to the month of January, 1905, gave notice to the local Land Office of any of the districts in which the townships described in said application were situated, or the local Land Office at Coeur d'Alene, Idaho, of the said application or of the reservation of said townships, or any of them, as required by said act; that said purported application was wholly void and without effect; and that the Commissioner of the General Land Office and the Secretary of the Interior, in the proper exercise of the authority vested in each of them by law, have frequently and in a number of cases held that said purported application was and is illegal, void and without effect, and inoperative to effect a reservation or withdrawal of the townships therein described, or of any land situated in either of said townships, or to create any preference or other right in the State of Idaho, or

to constitute or create an obstacle to the selection or other appropriation of any land in either of said townships by the defendant Railway Company, or any other person or corporation, or to any other claim to any of said lands under the public land laws of the United States, initiated or attaching prior to the filing of the township plat of survey of any such township. This defendant further alleges that the State of Idaho never made any valid selection or application to select the land described in the bill, or any part thereof, either before or after filing of the township plat of survey; and that the State of Idaho does not now claim or assert any right, title or interest in or to the said land or any part thereof.

11. This defendant alleges that on the 23rd day of July, 1901, the land described in the bill was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by the defendant Railway Company, as its successor, and was then being operated by the defendant Railway Company; that said land was so classified as non-mineral at the time of actual Government survey; that on said 23rd day of July, 1901, the defendant Railway Company by its selection list No. 71, duly made selection of the said land under the provisions

of the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park", approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules regulations, and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

12. This defendant alleges that on the 4th day of June, 1909, the official township plat of the survey of the township in which said land is situated, was filed in the said United States Land Office at

Coeur d'Alene, Idaho, and that on said last mentioned date and within the time specified in said Act of Congress, the defendant Railway Company caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 4 of said act, a new selection list embracing the selections embraced in the said selection list of July 23, 1901, including the selection of the land described in the bill, describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

13. This defendant admits that the said selection list No. 71, descried the said land in the manner alleged in said bill, but alleges that said list was so filed in the United States Land Office at Coeur d'Alene, Idaho, and not in the General Land Office.

14. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the description of said land contained in said selection list was imaginary, or that no land in the State of Idaho or elsewhere was or could be so designated or described, whether for the reason stated in the bill or otherwise; and denies that at that time there were no surveyed lands in such proximity to the lands so selected as to render such description and designation definite or certain, or capable of be-

ing made definite or certain, in any reasonable manner, or save and except by the making of an official survey by the proper officers of the United States; and denies that neither the defendant Railway Company nor any of its servants, agents, attorneys or employees knew or pretended to know what lands were referred to by such description, or that the defendant Railway Company did not then know that upon survey, such description would be applied to the land described in said bill; and denies that the description contained in said selection list was insufficient to designate, locate or describe the land so selected, or that the said selection was by reason of insufficiency of description or otherwise, void or of no force or effect; but alleges that, on the contrary, in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said act.

15. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the land described in the bill, or any part thereof, had theretofore been duly or otherwise appropriated by the State of Idaho, or at said or any other time was withdrawn from the public domain (except by virtue of such selection by defendant Railway Company); and denies that the same was not

then open to selection or appropriation by the defendant Railway Company under said Act of March 2nd, 1899, or in any manner, or at all, and denies that by reason of the making and filing of the said or any application or purported application of the State of Idaho for the survey of the said land, as alleged in the bill or otherwise, the said selection thereof by the defendant Railway Company was void or of no force or effect.

16. This defendant admits and alleges that shortly after the township plat of survey was filed in the said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, but on the 10th day of June, 1909, and not on the 4th day of June, 1909, as alleged in the bill, said Delany tendered to the Register and Receiver of said Land Office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but this defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by said Delany in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver in so rejecting such

application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of said Delany or of the plaintiff; and this defendant further denies that the decision of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

17. This defendant alleges that neither in the proceedings in the said Coeur d'Alene Land Office, nor in the General Land Office, nor before the Secretary of the Interior upon the said application of said Delany to enter said land, nor otherwise in connection with the same, was it ever at any time or in any manner claimed or asserted by or on behalf of said Delany, or by any other person, that the alleged claim or rights of said Delany rested upon anything which had occurred prior to his alleged settlement on said land on June 21, 1903, or upon the alleged settlement and location thereon by said Leach, or that any claim or right of any kind whatsoever had attached or been initiated to said land prior to the selection thereof by the defendant Railway Company on July 23, 1901, or that at the time of the selection of said land by the defendant Railway Company on July 23, 1901, the same was not then vacant and un-

appropriated public land of the United States subject to such selection.

18. This defendant alleges that the said selection so made by the defendant Railway Company of the land described in the bill, and the said selection list so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in the bill, a patent of the United States conveying the said land to the defendant Railway Company was duly issued, granted and delivered to the defendant Railway Company in accordance with law.

19. This defendant alleges that shortly after the selection of said land by the defendant Railway Company on July 23, 1901, and long prior to the time when said Delany went upon said land as alleged in said bill, this defendant entered into an agreement with the defendant Railway Company whereby the defendant Railway Company for a valuable consideration paid to it by this defendant, sold the said land to this defendant and undertook and agreed to convey the same to it by warranty deed; that thereafter and on or about the 5th day of Octoer, 1903, this defendant and the defendant Railway Company entered into a subsequent written contract dated October 5, 1903, whereby the defendant Railway

Company, for the said valuable consideration so paid to it by this defendant, and in consideration of the said prior agreement for the sale of said land to this defendant, agreed and undertook to convey the same to this defendant as aforesaid; that on the 17th day of July, 1916, the defendant Railway Company, by warranty deed bearing said last named date, duly conveyed the said land to this defendant; and that this defendant now claims to be and is the owner of said land, and all thereof, in fee simple.

20. This defendant denies that neither the defendant Railway Company nor this defendant, nor any agent, servant, attorney or employee of either of said defendants, have ever been in possession of said land or any part thereof; and denies that the plaintiff or said Delany or his alleged predecessor in interest have been in possession of said land since the first day of April, 1901, to the exclusion of all other persons or corporations, or at all; and denies that the defendants have not complied with the laws of the United States so as to entitled them to claim said land as against said Delany or the plaintiff; but alleges that, on the contrary, the defendant Railway Company has, in all respects, complied with all the laws of the United States and with the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office; and that by virtue of matters hereinbefore set forth, the defendant Railway Company became and was entitled to the said land and entitled to receive patent therefor.

21. This defendant denies that any of the acts or proceedings of the defendant Railway Company concerning the said selection, or any of the acts or proceedings of the officers of the said Coeur d'Alene Land Office, or of the Commissioner of the General Land Office, or of the Secretary of the Interior in connection therewith, or in the issuance of patent to the defendant Railway Company as aforesaid are or were contrary to or without authority of law, or in violation of any rights of said Delany or of the plaintiff; and denies that the rejection of said Delany's said application was wrongful or unlawful, or in violation of any right of said Delany or of the plaintiff, or based upon an erroneous construction of the law, or upon a statement of facts concerning which there was and is no conflict; and alleges that all the acts and proceedings of the defendant Railway Company and of the officers of said Coeur d'Alene Land Office and of the Commissioner of the General Land Office and of the Secretary of the Interior in rejecting and confirming the rejection of said Delany's said application and in approving the selection of said land by the defendant Railway Company and in issuing patent to it, were right and proper and in accordance with law.

22. This defendant denies that on the 16th day of June, 1916, or at the time of issuance of patent to the defendant Railway Company as aforesaid, or at any other time whatsoever, said Delany or the plaintiff was the owner of said land or the holder of the legal title thereto or entitled to patent for the same;

and denies that said Delany or his heirs or other successors in interest or the plaintiff has or have now, or ever had, any right, title, or interest whatsoever in or to the said land or any part thereof; and alleges that by virtue of its selection of the said land as hereinbefore set forth, and by virtue of the patent issued to it as aforesaid, the defendant Railway Company became and was the owner of said land in fee simple, free from any claim, right, title or interest of said Delany or of the plaintiff or any other person whomsoever, except this defendant; and that by virtue of the conveyance of said land by the defendant Railway Company to this defendant became and it now is the owner of said land and all thereof in fee simple, free from any claim, right, title or interest to or in the same on the part of said Delany or the plaintiff or any other person whomsoever.

23. Defendant admits that said Belden M. Decient to form a belief as to whether said Delany died subsequent to the commencement of this suit; but this defendant has no knowledge or information sufficient to form a belief as to whether said Delany died testate or intestate, or as to whether he left any heirs at law; or as to who the heirs of said Delany, if any, were or are; or as to whether the plaintiff, Alra G. Farrell, was or is an heir of said Delany; or as to whether any heir of said Delany has assigned, conveyed ,or otherwise transferred to said plaintiff his supposed right, title or interest in the land described in the bill, or any thereof; or as to whether said plaintiff has in any manner acquired or suc-

ceeded to the supposed rights or interests in said land, or any thereof, asserted or claimed by said Delany.

WHEREFORE, this defendant prays that it be hence dismissed, with costs.

EDWARD RUTLEDGE TIMBER
(Corporate Seal) COMPANY.
By WM. J. MERRIGAN,
Secretary.
STILES W. BURR,
St. Paul, Minnesota.
SKUSE & MORRILL,
Spokane, Washington.
Solicitors and of Counsel for defendant, Edward Rutledge Timber Company.

(Duly verified.)
Endorsed. Filed Nov. 5th, 1917,
W. D. McReynolds, Clerk.
By L. M. Larson, Deputy.

(Title of Court and Cause.)
No. 660.
ABSTRACT OF EVIDENCE.

The following is an abstract of so much of the evidence introduced on the trial of the above entitled case as is material to the questions raised on this appeal.

At the commencement of the trial, after calling the witness W. B. Leach but before the latter had testified, counsel for plaintiff, Mr. Kenyon, stated to the Court, in substance, that while it was alleged in the

complaint that the witness W. B. Leach settled on the land in suit on or about the first of April, 1901; and while this allegation had been made in good faith on the strength of information believed to be correct; it had been ascertained by conference with the witness Leach and others, immediately previous to the trial, that Leach did not in fact make settlement on the land until the year 1902; so that the issue of priority based upon the allegation of settlement in April, 1901, was eliminated from the case.

W. B. LEACH, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I settled upon the Northeast Quarter of Section 20, Township 43, North Range 4, E. B. M. in the spring of 1902. I built a cabin and of course cut a little wood around there, opened up a little, and done what little improvement I could, and I put up notices on the corners of this land which was then unsurveyed. We measured this land out. Ed Kleinard, the man who located me, helped me put up the notices. The notices stated that I had taken up 160 acres of land as a homestead. Put a notice on each corner and plazed the line around the land. I also kept my name written on the door. No one else ever laid any claim to this ground while I was there. I made my home there from about May 22nd, until about June 23, 1903, the following year, when I let Delany have it. I sold and turned over to Delany all my improvements, cooking utensils, bed and table, and

what I had there. He took possession and established his home there at that time.

I was born in the United States, and was competent at that time to acquire title to land under the homestead laws.

ED KLEINARD, called as witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

I reside at Clarkia, Idaho, where I have lived close to twenty years. I know W. B. Leach the witness who just testified. In May, 1902, I located him upon what is now the Northeast Quarter of Section 20, Township 43, North Range 4 E. I blazed out the claim, and when I took him on it I put up notices, took an ax and blazed the line around it from one corner to the other, and posted a notice on each corner, stating that Leach claimed a half mile square within the blazed line as a homestead. I was a witness to his notices.

I was back there again in July, 1904. I saw very good improvements on the land. He had done some clearing. I think he built a new cabin, because it was not the same cabin that Leach built. It was built of logs. It was large enough to stand the test as far as being big enough to comply with the homestead laws. I should judge it was 14x16, or 12x16, or something like that. About seven or eight feet high. Had doors and windows. It was furnished at this time with cooking utensils, beds and bedding. I stopped there over night. There was a little garden

in the clearing. About two acres was cleared in all; not all this was in cultivation at that time. It looked as though it had been cleared too late to put in a crop, about one-half acre was in crop. The garden appeared to be cultivated and cared for.

I was on the claim again a couple of times in 1910. First time about the latter part of Septemer. I found a little better improvements than before, some fencing and more clearing and more garden. There was a couple of acres cleared any way, and it seemed to be all fenced. He had two good buildings there, what he called a barn and the cabin. He had constructed a new and better cabin and used the old one for a barn. The cabin had a floor of split cedar hewed with an adz, and a shake roof. It was well furnished and well stocked with supplies.

Delany and his brother were there and had been fighting fire there at the time, there was fire all around there at that time. I was engaged in fighting fire a month, and they were at it some time before I went in. Most of the time while they were fighting fire they lived in Delany's cabin, there at his home.

I was there again in 1912. The improvements were much the same as I saw in 1910, only a little more clearing. All of the ground was planted except what was in hay. He had an acre and a half or two acres in hay, and about one-half acre in garden, about two acres all together. There was no one on the place when I was there in 1912.

CROSS EXAMINATION

This is agricultural land. It would grow crops if it was cleared. It is pretty rough, and has some ra-

vines running through it, and is covered with heavy timber. There are flat benches on it but most of it is rough land. I heard Leach say his cabin burned, and Billy Delany, as he called himself, went in as soon as it was burned and built another one. I remember of his building it. There was about two acres cleared in 1912; that much any way and there might have been four, I don't know. There was pretty close to two acres in 1904, but it was not thoroughly cleared yet. I did not see any one there when I was there in 1904. He had the brush cut and he went in and done some logging right after that, took teams in there and logged. I saw them with the teams in there in 1910. He had his brother's team in there.

RE-DIRECT EXAMINATION

If there was no timber on this land you could cultivate about eighty acres of it.

ALRA G. FARRELL, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I am the plaintiff in this case. I am the sister of Beldon M. Delany, the party who started this action. He died on November 21st, 1916. He had never married, and left no father or mother. He was survived by three sisters and a brother, to-wit: David Delany, Alice Delany McDonald and Lena Delany Lohoefer and myself.

Q. Those are all the brothers and sisters?

A. Yes.

He left no child of any deceased brother or sister.

Alice Delany McDonald is married, her husband's name is Lee McDonald. Lena Delany Lohoefer is married, and her husband's name is G. A. Lohoefer. David Delany is a bachelor.

Plaintiff's Exhibit No. 1, being a quit claim deed from Alice Delany McDonald, Lee McDonald, David Delany, Lena Lohoefer and G. A. Lohoefer to Alra G. Farrell, conveying all of their right, title and interest in and to the Northeast Quarter of Section 20, Township 43, North Range 4, E. the land involved in this action, identified and introduced in evidence.

Mr. Burr: "I don't raise any question of the sufficiency of the deed as a conveyance from those peo ple of what rights they were able to convey, but I don't mean by that I think they were competent to convey, or that they had any title to convey."

I know that my brother Beldon M. Delany was making his home upon this land at the time of his death. Beldon M. Delany was a native born citizen of the United States, about 23 years of age. He had never made a homestead entry prior to his settlement upon this land, and was not at that time the owner of any land.

IRA MCPEAK, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I live at Clarkia, Idaho, where I have lived since the fall of 1892. I knew Beldon M. Delany prior to 1900, before we went into the Marble Creek country. I met him on his place on Marble Creek in

July, 1903, what is now the Northeast Quarter of Section 20, Township 43, North Range 4, E. I had a homestead at that time partly on Section 19 and partly on Section 20. Our cabins were a little over a half mile apart. I settled there in 1901. Visited him a couple of times in July 1903. He built a cabin. Leach's cabin I think burned in 1902. Delany built a log cabin with a shake roof, about 14x16 feet in size, had doors and windows. Delany lived in it. He had stocked it with provisions and cooking utensils. He put in a floor. There was a little clearing around the cabin at that time and planted to a little garden stuff. I saw Delany there in February, 1904. He was living there at that time. He was living there in July, 1904. I was at his place then. He had a little more cleared. He had a garden of potatoes, radishes, lettuce and such things. The garden seemed to be well cared for. I saw him there three or four times during the summer at different times. I didn't go in in 1905 until late, about July or August. Delany had his garden in at that time. He had something like an acre cleared. Practically all that was cleared was in crop. Some timothy and some small garden truck. I was there a number of times that summer and know that the garden and crop was cultivated and cared for. Delany was making his home there then.

I saw him there again in 1906. We generally went in as early as the snow would be off so we could get in. He was there when I went in in 1906. He cleared some more land. Planted and cultivated what he

had already cleared, planted some more timothy and grain, I believe he had some oats in and some garden stuff and potatoes. Probably a quarter of an acre in garden stuff and potatoes. I saw him there as late as September, possibly October.

I also saw him there in the summer of 1907, I couldn't say exactly what date. His clearing and improvements were in good shape that year, he had some in garden and had cleared a little bit land. I next saw the place before Delany died, in August, 1911. Delany was not there when I was there in 1911. At that time he had between two and three acres cleared. He had some timothy and some grain too. I lived on my claim until July, 1910. Up until that time Delany made his home on this piece of land. He was working there most of the summer of 1910. He done quite a little clearing, and built a new cabin. At that time he had this house, and what he called a tool house, and a barn, and something like two or three acres cleared. He had a log and brush fence around his clearing. The cabin had a puncheon floor. His brother was living there with him. They were both working on the claim. The cabin at that time was furnished with cook stove, some chairs, and cooking utensils of all kinds that a person would need, and dishes, and there was also a supply of provisions. His improvements were as good, if not better, as most of the settlers in the vicinity. Probably one-half of the land would be suitable for crops if the timber was cleared off.

CROSS EXAMINATION

If the land was cleared I think you could plow and crop one-half of it, something like that. The land is covered with heavy timber. It is comparatively level about the clearing. It is a rough and broken quarter. I lived on my homestead there from 1901 most of the time until 1911. I was burned out in 1910, the year of the big fire, but went back in 1911. Have not been there since.

The Court: Are your other witnesses along somewhat the same lines, Mr. Kenyon?

Mr. Kenyon: Along the same lines, your honor.

The Court: Are you going to controvert the facts generally shown by these witnesses, Mr. Burr?

Mr. Burr: I don't think we are going to controvert, your honor, but I would prefer to have the showing made by the witnesses; but we have no evidence to oppose the evidence that is being given here on the question of subsequent cultivation.

The Court: Then I see no use of putting the other witnesses on. In other words, if you are not going to put any testimony in relative to these general matters as to cultivation and improvement.

Mr. Burr: We are not going to dispute it at all.

The Court: I can't see that other witnesses then would help you any, because I shall assume that these witnesses are telling the truth, if it is not controverted. If there is any respect in which they can supplement it, very well.

Mr. Burr: I think there is a marked insufficiency of proof, your Honor.

The Court: That may be. I understand your position. You are going to contend that as a matter of law this proof is insufficient, assuming it to be true.

Mr. Burr: Assuming it to be true. But I am not going to contend that it is not true.

ORAL AVERY, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I live at Clarkia, Idaho, where I have resided for 15 years. I knew Beldon M. Delany in his life time, and had a homestead near his. I settled there in 1904. I first met Delany on his claim in the summer of 1904. He was there working, he had a cabin and some clearing. I didn't see him any more until the next summer. He had been there and done some more improvements. In 1905 I helped him saw lumber for a cabin floor and helped him fix up the cabin. In 1906 I also went in there in the summer and saw him on his claim and working and improving the land, and I was there in the fall of 1907. He was not there but I could tell from the way his land looked he had been there. My sister had a claim at Clearwater. I used to go through there by his claim to see her two or three times a year, going back and forth, and he always kept up his improvements, also had in a garden, and the cabin was also in good fix. In 1910 was in several times and got supplies, meat and flour, from there to fight fire, and Delany was fighting fire in 1910 for about thirty

days. In the summer of 1912 I went to stay at his place. In 1912 there was a house, a barn, tool house, and cellar or root house, and about three acres, or maybe three and a half acres cleared, all in cultivation.

IRA MCPEAK, a witness on behalf of the plaintiff being re-called, testified as follows:

DIRECT EXAMINATION

On June 21, 1903, the nearest surveyed line to the Northeast Quarter of Section 20, Township 43, North Range 4, E. B. M., was the east line of Township 43, North Range 2, E., B. M. 7½ miles distant. The land between these two lines was very rough and mountainous, most of it covered with heavy timber.

The foregoing testimony of the witness McPeak was seasonably objected to by counsel for defendants, on the ground that the same was incompetent, immaterial and not the best evidence, and the same was received by the Court subject to the objection.

CROSS EXAMINATION

The South line of Township 34, North Range 4, E. B. M. was surveyed at that time. I think that line was a little farther away from Delany's homestead.

Plaintiff's Exhibit 2, Deposition of Clay Tallman, Commissioner of the General Land Office, introduced in evidence, the material portion of which is as follows:

The Commissioner of the General Land Office of

the United States is the custodian of all the records and files of the Land Department.

Taking advantage of the information acquired through the instrumentality of the officers, clerks and employes of the General Land Office, whose business it is to attend to the details of the work of that bureau, I will say that the records of the General Land Office show that claims were initiated to the Northeast quarter of Section 20, Township 43, North Range 4, E. B. M. State of Idaho, prior to the survey of said tract. The records of the office show that the survey of said township was approved November 24, 1908, and filed in the local United States Land Office at Coeur d'Alene, Idaho, on June 4, 1909. The records further show that on June 10, 1909, one B. M. Delany filed homestead application on the Northeast Quarter of said section, in which application he alleged settlement of this land on June 21, 1903.

The records of the office show that as early as July, 1901, the Governor of the State of Idaho filed an application in the office of the United States Surveyor General for the survey of this Township 43, North Range 4, E. and other townships, such application being made under the Act of August 18, 1894, for the purpose of satisfying grants made by Congress to the State of Idaho.

The records of this office further show that as early as July 23, 1901, the Northern Pacific Railway Company selected said Northeast Quarter, with other lands, under its list No. 71, under the Act of March 2, 1899 (30 Stat. 993), and, further, that on

June 4, 1909, the Railway Company filed a re-arranged list describing the tracts according to the Government survey. So far as I have been able to inform myself, these are all of the claims initiated or attempted to be initiated, to the lands in question prior to the filing of the approved plat of survey on the date I have stated.

I have caused an examination of the records and files of my office to be made for the purpose of determining whether these applications to which I have just testified are the only ones shown of record, and for the purpose of ascertaining whether or not there were any other claims initiated or attempted to be initiated, prior to the filing of plat of survey, and to the best of my knowledge and information, the claims I have described were all the claims initiated or attempted to be initiated, to the lands in question, as shown by the records of this office, prior to the filing of the plat of survey.

The papers marked Exhibit "A" consist of a bunch of certified copies of records of the General Land Office, under one certificate, being described in the certificate as "copy of application for survey by the Governor of Idaho under the Act of August 18, 1894, and a copy of School Indemnity List Coeur d'Alene 02604, with copies of papers and letters relating to said application and list, and a copy of General Land Office decision dated July 16, 1914, relating to State Indemnity Selection List Coeur d'Alene 02604 and 02484, and other lists." As to what these papers are, they show for themselves. As to the

date of filing of the respective papers, I can only testify as to the dates shown on the papers themselves, which is the best and only information available. The application for survey to which I just referred is the first paper at the top of this bunch of certified copies, which for identification I have marked "A-1" in the upper right-hand corner. So far as I know, these were all the papers that were considered in connection with the decision of the conflicting claims to this township. It should be stated, however, that the application for survey embraces several townships, the status of many of which is doubtless the same. I am unable to state what if any other papers in connection with the disposition of claims to the land in other townships emraced in said application for survey might have been considered by the adjudicating officers in deciding the conflicting claims referred to, to the NE¼ Section 20, Township 43, N., Range 4 E.

"Q. Please state whether in the usual orderly course of business any other papers would be properly considered.

"A. It seems to me that any papers, decisions or data before the office or Department, relating to other townships in the same application for survey similarly situated might have been properly considered in connection with these conflicting claims to this land here at issue for whatever they were worth.

"O. Do you know of any such, and if so please state.

"A. I do not know."

The certified copies handed me and marked Exhibit "B" for identification, consist of copies of Clear List No. 109, Northern Pacific Railway Company, and papers and letters relating thereto. The papers handed me and designated as Exhibit "C" consist of copies of selection list No. 71 of the Northern Pacific Railway Company, and papers and letters relating thereto, and designated on the Land Office records as Coeur d'Alene 02484. To the best of my knowledge and belief they are all of the records and files pertaining to the list named, except copy of the final patent, copy of the notes of survey of the township, plat of survey and tract book records. There may be also confidential reports of special agents bearing on some or all of the lands referred to in this list, which are not considered a part of the public records, but so far as I can find, there are no records or files respecting these lands which need to be considered as confidential, for the reason that it appears that under date of May 13, 1915, the Acting Director of the Geological Survey certified with respect to this section 20, and other lands, that the records of the Survey indicate that there are no valuable deposits of coal or other minerals within the area specified, and that the lands have no valuable power site or reservoir possibilities. A copy of this certificate is included in the certified copies referred to under Exhibits "B" or "C". I have caused an examination to be made, and to the best of my knowledge and belief this is the only paper of that charac-

ter with respect to this particular section of land bearing on this railroad selection.

Exhibit "D" is copies of the records and files of the General Land Office pertaining to homestead entry of Beldon M. Delany, the same being designated on the records as Coeur d'Alene 02539. To the best of my knowledge and belief, they are all of the papers on file in this office relating to the homestead proceedings in question. I do not mean to say that these are all the records and files in this office in any way relating to the land in question, for as appears by my testimony there were other claims filed for the land, also there are on file the notes of survey of the land and the plat of such survey.

Q. In the regular orderly course of business, do you know of any other files or papers that would have been proper to consider in connection with this homestead claim?

A. In all cases of entries and selections for public lands, the tract book records of the General Land Office and of the local office, and the plats filed in the local office on which entries and selections as a rule are marked, are proper and necessary subjects of reference in determining rights to public lands.

Q. Please state upon what records and files in case where there had been no hearing an application for homestead entry would be considered.

A. It would be considered on the basis, first, of the papers constituting the application under consideration, secondly, all conflicting applications to enter or select, or entries or selections, if any ,for the

same land as disclosed by the tract book records, local office plate, or indexes, together with all the records and files constituting or making up any such conflicting claims that might be found, inclusive of withdrawals by the Government, as shown by such records.

Q. Would our would not that have anything to do with the question whether he complied with the homestead law under which his application was made?

A. Not necessarily, but they might. Of course the validity of the homestead entry must stand on its own facts and the acts and performances of the entryman in compliance with the law. The other records and files might be of such a character, however, as to show that he had not complied with the law, and place the Government on inquiry before proceeding to allow patent.

Q. If you know of any other records, files or papers that were considered in connection with the question whether the homestead applicant complied with the law, please state what it is.

A. I know of no other records or files bearing on the compliance of the homestead entryman with the law. It is understood of course that this answer refers to the affirmative acts of the homestead entryman in compliance with the requirements of the homestead law and is not intended to have any bearing on the questions of conflicts that maye have arisen by reason of other and different claims to the same land.

The papers handed me marked Exhibit "E" consist of a copy of the field notes of the survey of the subdivisional lines of Township 43, North Range 4, E. Boise Meridian, Idaho, so far as they pertain to section 20 of said township and range, and they are complete so far as concerns the subdivisional lines of said section 20. After a careful search of the records which I have caused to be made in this office, to the best of my knowledge and belief these are all the records and files of the General Land Office relating to the three claims which I have mentioned, with the exceptions heretofore noted, and they are all of the papers, files and records that would have been considered in the usual and ordinary method of transacting business in the Land Department.

CROSS EXAMINATION, BY MR. BURR:

I intended to state, for instance in the homestead case, that these certified copies include all the papers filed and all the papers or records in our office in connection with that case. I do not mean to say that in making decisions the records and files in the other related cases were not also considered. So far as I know, however, I don't know of any papers outside of these files that could have been considered in the disposition of any one of these cases. The rule is to keep all the papers in a cose that is appealed from the General Land Office in one record. When the Department is through with that record, the entire record is returned to our office for the files. Referring to Exhibit A-1, in the light of this paper it-

self and of related papers and correspondence, I should say that the filing mark "Received July 8," indicated the date of the receipt of this paper in the office of the Surveyor General at Boise, Idaho.

I do not mean to say that this set of copies Exhibit "A" contains all of the records of the department and the proceedings of the department or of the General Land Office relating to that application for survey. I think I mentioned in a previous answer to a question on direct examination that the application for survey in question covers a number of townships. I do not know at present, nor do I mean to testify, that the various sets of certified copies referred to include all of proceedings with respect to all the tracts of land referred to in that application. There may have been many proceedings on other lands in no way connected with this township or section. It is not at all unlikely or improbable that in passing upon the question of the validity of this application for survey with respect to land in Township 43 N., Range 4 E., the department and the General Land Office might well have considered, and possibly did consider, the records and proceedings relating to that application which would be found in files relating to different townships. In fact, I understand that these townships are involved in the so-called Marble Creek cases, with respect to which there has been a good deal of departmental litigation during past years. I do not wish to be understood to testify that the certified copies heretofore referred to in my testimony cover all papers considered in connection with the

conflicting claims in this township. If I did so testify, it was inadvertent. I cannot testify as to what papers some adjudicating officer, either in my office or in the Department of the Interior, may have considered in the decision of any particular case, but I do intend to testify to the fact that to the best of my knowledge and belief such copies include all of the official records in the cases in question which such adjudicating officers could have had before them at the time of making the decision in question, insofar as such papers consist of the records and files of papers filed with specific reference to these particular cases.

Q. You have testified that in the usual and orderly course of business in the adjudication of cases of this character, other papers on file in other so-called cases might properly be considered. Now do you wish to be understood to testify as to whether or not the adjudicating officer passing upon the conflicting claims to this land did or did not consider papers in other cases, and that it is not improbable that it might have been done?

A. It is possible. In the handling of this or any other cases the guide of the officers under ordinary circumstances is the tract books which are intended to show all conflicting claims to the particular tracts of land involved. They would very naturally examine the records in those other cases unless they were old cases, which had been entirely closed and therefore need not be considered. Such records might refer to still other cases similar or identical in char-

acter, the consideration and disposition of which might have some bearing on the case to be adjudicated.

Q. Then from your answer and from what I know of departmental practice, I take it that the papers considered in dealing with the valadity of a homestead claim with regard to conflict with other claims to the same land would very likely be found in the file of that particular case, but that in dealing with the question of the right of the Railway Company selecting a number of tracts of land, or such a question as that, or an application for survey involving a number of townships, it would be much more proable that rulings and orders and proceedings and testimony taken in cases involving other tracts of land but the same selection list or the same application for survey, would be considered?

A. Certainly.

Q. The file relating to a particular contest between an individual settler, claimant and railway company, or the State of Idaho, or relating to a particular homestead claim would not be likely to contain papers bearing upon the validity of the railway selection or the State selection.

A. Not necessarily, and not likely insofar as such validity or invalidity was in no way concerned with the homestead.

In the ordinary course of our practice and procedure a complete showing might not be in the file relating to the individual claim. The validity of one claim might depend upon the facts in the conflicting

claim, and insofar as the facts pertaining to one claim affect the other, somewhere in both records evidence of that fact should appear.

RE-DIRECT EXAMINATION

I did not state that there were other records pertaining to other conflicting claims as against that of Delany, for I knew of none such. I did state with respect to the application for survey, a copy of which appears in Exhibit "A", that such application included a large area of lands other than this section 20 under consideration, and that there may have been various other examinations made and decisions rendered with respect to such other claims which might disclose matters properly to be considered, and which might have been considered fully, in connection with conclusions arrived at on this matter of application for survey. It is my belief, from the examination we have made of the record, that there is nothing else of record other than what is contained in these various sets of certified copies by which the conflicting claims of these conflicting claimants could be determined, but I cannot presume to state that no other cases or records were taken into consideration in the determination of the rights of these parties. Reference has already been made to the Thorpe case, the Daniels case, and other cases decided by the Secretary of the Interior on appeal from the General Land Office, all of which I understand involved closely related questions. Where cases are reported in the published reports of the Secretary

of the Interior, the volume of the land decisions in which it is published is as a rule pointed out in the citation, but there are many decisions of the Secretary of the Interior that do not appear in the published decisions. They are all public record available to the public, but the land decisions that are published are selected decisions and constitute only the important and particularly leading cases.

Mr. Burr: Following your Honor's suggestion, we consent to the introduction of the deposition of Commissioner Tallman, with the understanding that it does not apply to the exhibits referred to in that deposition and attached to it, which I think should be offered separately.

Plaintiff's Exhibits 2-A, 2-B, 2-C, 2-D, and 2-E admitted in evidence.

Plaintiff rests.

Defendants' Exhibits No. 1, 2 and 3 admitted in evidence.

It is conceded on the part of plaintiff that the records of the United States Land Office in Coeur d'Alene, do not show any withdrawal of the land on the State's application for survey, until the one made by the letter of January 20, 1905.

Defendant rests.

ABSTRACT OF EXHIBITS.

Plaintiff's Exhibit "2-A" is in part as follows:

Boise, Idaho, July, 5th, 1901.

The U. S. Surveyor-General for Idaho, and the

Honorable Commissioner of the General Land Office.

Sirs:—

The undersigned Governor of the State of Idaho, hereby applies under the provisions of the Act of Congress approved August 18th, 1894, for the survey of the following townships, with a view to satisfy the public land grants made to the State of Idaho by the Act of Congress approved July 3rd, 1890, admitting said State into the Union, and subsequent Acts amending the same:

Township 43 N., R. 4 E. * * * *

(And other lands, describing eighteen townships in all.)

Very respectfully,

F. W. HUNT,
Governor.

DEPARTMENT OF THE INTERIOR.
Office U. S. Surveyor General,
District of Idaho.
Boise City, July 10, 1901.

Honorable Commissioner of the
General Land Office,
Washington, D. C.

Sir:—

I have the honor to submit herewith an application of the Governor of the State of Idaho for the survey of the following townships:

Township 43 N., R. 4 E. * * * * (And

other land, describing eighteen in all).

* * * * *

Based upon the Governor's application, I recommend the survey of the townships stated, with the exception of the three included or to be included in awarded contracts, but it is not deemed advisable to proceed with advertising for bids until after the demands of settlers can be more accurately determined.

Very respectfully,

JOSEPH PERRAULT,

U. S. Surveyor General for Idaho.

(Endorsed as follows) U. S. General Land Office.

Received July 15, 1901.

United States Surveyor General

Boise City, Idaho.

Dated July 10th, 1901.

Subject.

Submits Division E application for the Governor of Idaho for certain surveys.

See to Surveyor General July 10, 1901. Feb. 12, 1902.

See to F. W. Hunt Governor Boise, Idaho, and Hon. H. Heitfeldt, U. S. Senate, February 10, 1902.

File July 15, 1901.

See to F. W. Hunt, Governor, Idaho, Oct. 6, 1902.

DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE.

Washington, D. C., July 19, 1901.

Subject:

Application of the Governor for public surveys, Idaho.

The U. S. Surveyor General,
Boise City, Idaho.

Sir:

I am in receipt of your letter of July 10, 1901, enclosing the application of the Governor of Idaho, dated July 5, 1901, for the survey of 17 full townships and one fractional township, designated as follows:

Tps. 43, N. R. 4 E. (And other townships).

* * * * *

In reply you are requested to secure from the Governor, or the proper officer, a statement showing the *total area* of lands selected to date; also the approximate area of *all* of the townships heretofore applied for by the Governor; also to report whether or not *the total area* to which the State is entitled under the enabling act has not, or may be selected from the lands embraced in the townships heretofore applied for, the total number of which (approximately) is 206.

Pending the receipt of the report of the Governor no action will be taken in the matter of withdrawing from further disposal the lands in the 18 designated townships named in the Governor's application of July 5, 1901.

In the opinion of this office the areas embraced in the townships designated in the applications for survey heretofore made by the Governor from April, 1895 to July 1, 1901, are deemed sufficient to enable the State officers to make the requisite selections *in full*, and that the public interests will *not* be sub-

served by further withdrawals of lands from settlement, pending the settlement of the State's rights under the Act of Congress approved July 3, 1890, admitting Idaho into the Union, and subsequent acts.

Very respectfully,

BINGER HERMANN,
Commissioner.

Department of the Interior.
General Land Office.
Washington, D. C., February 12, 1902.

Subject:

Application by the Governor for public surveys.
Idaho.

The U. S. Surveyor General,
Boise, Idaho.

Sir:

Referring to your letters of July 10, August 17, and August 20, 1901, transmitting the applications of the Governor of Idaho for the survey of designated townships under the provisions of the Act of Congress approved August 18, 1894 (28 Stats. 384) you are advised that by office letter "E" of February 10, 1902, Hon. F. W. Hunt, Governor, has been advised that this office has recommended to the Secretary of the Interior, and there has been inserted in the estimates for the public surveys and resurveys of the public lands for the fiscal year ending June 30, 1903, an additional amount of $25,000; also that in the event of said additional amount being finally appropriated by this office will take pleasure in consider-

ing the Governor's pending applications for additional surveys under the act of August 18, 1894, supra.

Very respectfully,

BINGER HERMANN,

Commissioner.

DEPARTMENT OF THE INTERIOR

General Land Office.

23464-1902. Washington, D. C., February 10, 1902.

Subject:

Application by the Governor for public surveys in Idaho.

Hon. F. W. Hunt, Governor,

Executive Office,

Boise, Idaho.

Sir:

I am in receipt, through Hon H. Heitfeldt, U. S. Senate, of your letter of January 25, 1902, relative to you rapplication under date of July 5, 1901, for the survey of designated townships in Idaho, under the provisions of the Act of Congress approved August 18, 1894 (28 Stats. 394); also calling attention to your letter of August 16, 1901, submitting report as to the status of the lands previously applied for by the State, as requested per office letter "E" of July 19, 1901.

In reply I have the honor to inform you that your letter of August 16, 1901, as also subsequent applications for survey, were duly received, and the delay in acting thereon was due to inability to definitely de-

termine the status of the apportionment made to Idaho of the annual appropriation for surveys and resurveys of the public lands for the ensuing fiscal year.

To the end of enabling this office to increase the apportionment to Idaho of the annual appropriation for public surveys for the fiscal year 1902-1903, so as to provide for the cost of survey under said act of August 18, 1894 supra, I have recommended to the Department, and there has been inserted in the estimates for the surveys and resurveys of public lands for the fiscal year 1902-1903 an additional amount of $25,000.

In the event of said additional amount being appropriated I will take pleasure in considering your application now pending for additional surveys.

Very respectfully,

BINGER HERMANN,

Commissioner.

NOTICE.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE.

Notice is hereby given that the State of Idaho on the 30th day of July, 1909, filed in this office a list of lands No. 02601 selected by its State Board of Land Commissioners for Indemnity School purposes under Section No. 4, Act of July 3d, 1890, as follows:

Part of Section	Section	Township	Range
All	20	43	4 E.

Copies thereof by descriptive sub-divisions have

been posted in this office for inspection by any person interested, and the public generally.

Section 11, Regulations April 25, 1907.

"During the period of publication, or any time thereafter, and before final approval and certification the local officers may receive protest or contest as to any of the tracts applied for, and transmit the same to the General Land Office."

Where lands sought to be selected are alleged by way of protest to be mineral or where applications for patent therefor are presented under the mining laws, or are otherwise adversely claimed, proceedings in such cases will be in the nature of a contest, and will be governed by the rules of practice in force in contest cases."

Published in
Idaho Press,
Wallace, Idaho.

W. H. BATTING,
Register.

DEPARTMENT OF THE INTERIOR
General Land Office.
Washington, July 16, 1914.

State of Idaho,
Heirs of Charles E. Everson, and Martin Groundwater, Guar. of John C. Groundwater,
v.
Northern Pacific Ry. Co.
Register and Receiver,
Coeur d'Alene, Idaho.

Holding State indemnity school land selections for cancellation and suspending action as to conflict between railway and homestead claims.

Sirs:

On July 23, 1901, there was filed in your office Northern Pacific Railway Company's list No. 71, under the act of March 2, 1899 (30 Stat., 993), covering * * * (here follows description of a quantity of lands in Township 43 N., Range 4 E. B. M., including all of Section 20) then unsurveyed. The plat of the survey of said township was filed in your office, June 4, 1909, and on the same date, the company filed its re-arranged list No. 71, redescribing its selections to conform to the survey, as required by said act of March 2, 1899, the tracts being then described as * * * (here follows re-descriptive descriptions, including "Section 20"). This list was held by you until August 31, 1909, when you rejected it for the reason that the same was in conflict with selections made by the State of Idaho. Notice of said rejection was not given to the company until September 20, 1909, and, on October 5, 1909, the company appealed from said rejection, urging that you were without authority to take any action thereon other than to report the same to this office for the reason that said list was merely filed to redescribe the original selections according to the survey.

Complaint having been made by the resident attorneys for the company that you had allowed selections by the State covering nearly all of the tracts selected by it as above described, by letter "F", dated December 15, 1909, you were advised that your action in approving the school selections in the face of

the selections of record was contrary to the regulations and practice of the Department and you were instructed to thereafter approve no application to make selection or entry of any lands for which an existing selection or entry remained intact on your records. By letter "F", dated December 18, 1909, your decision rejecting the company's re-arranged list was set aside and vacated, this office holding that you had no authority to reject the same, and that when such a list is filed in your office, you should note thereon the date of receipt and immediately forward it to this office.

* * * * * * * * * * *

The records of this office show the following selections and homestead applications in conflict with the company's selections first herein described:

State Indemnity School list 02604, covering all of Sec. 20, filed July 30, 1909, and approved August 19, 1909, * * * (And other selections and applications.)

The records of this office show that all vacant, unappropriated public lands in the township here in question were temporarily withdrawn by letter "E" dated March 21, 1905, for the proposed Shoshone National Forest, but that they were restored by the Secretary, June 19, 1907, and again became subject to settlement September 30, 1907, and to entry, October 30, 1907.

The township here involved is also noted on the tract book as withdrawn under the act of August 18, 1894 (28 Stat., 394), by letter "E" dated January

20, 1905, said withdrawal being based upon the Governor's application, dated July 5, 1901.

It is shown that the selections of the State now under consideration, have assigned as bases therefor, parts of sections 16 and 36 in townships within the Henry's Lake Forest Reserve, established May 23, 1905, now Targhee National Forest by President's Proclamation, effective July 1, 1908.

By letter, dated February 18, 1910, the resident attorneys for the railway company filed a brief in support of the selections of the company, in which they discussed the claims of the respective parties under the following propositions:

"1. By the action of the Idaho Legislature in March, 1909, the representatives of the State were absolutely prohibited from making selections as indemnity for Sections 16 and 36 on the ground that such sections had been included within forest reserves; and that the attempt in this case to make selections as indemnity for bases of that character was wholly unauthorized and void.

"2. Irrespective of the action of the Legislature above referred to, the attempt made by the State Board of Land Commissioners and its representatives to select the lands in controversy as indemnity for alleged losses of sections 16 and 36 included in forest reserves was, under the constitution and laws of Idaho as construed by the Supreme Court in the case of Balderston v. Brady, wholly unauthorized and void.

"3. There was a complete failure of compliance

on the part of the State with the essential requirements of the act of August 18, 1894, in the particulars which will be set forth in the course of the argument of this proposition; and in consequence thereof the act of 1894 never became operative upon the land here involved, and no rights accrued under said act. This point involves a number of subordinate propositions which will be considered in the course of the argument thereof.

"4. Unless the State is entitled to the land by virtue of a superior preference right obtained under the act of 1894, and a subsequent valid selection of the lands in dispute, then the Railway Company's selections are unquestionably valid, and it is entitled to patent for the land."

By letter, dated March 24, 1910, the Assistant Attorney General of the State of Idaho filed a brief in reply to that of the Railway Company, on April 29, 1910, the attorneys for the Company filed a brief in auswer thereto, and, on May 20, 1910, the Assistant Attorney General for the State filed an answer to the second brief of the Railway Company.

With respect to the contention of the company that the State failed to comply with the requirements of said act of August 18, 1894, it may here be stated that the records of this office show that the application of the Governor of Idaho, under consideration, which was dated July 5, 1901, was filed in the office of the Surveyor General of Idaho, July 8, 1901, and by him forwarded to this office, by letter, dated July 10, 1901. The application on file here shows that it

was received, July 15, 1901. The proof of publication required by said act was filed in this office with the Governor's letter, dated August 18, 1904, and consists of a certified copy of an affidavit showing that publication was made in the Idaho State Tribune of Wallace, Idaho, commencing with the publication of July 10, 1901, and continuing to and including August 14, 1901.

By letter "E", dated January 19, 1901, addressed to the Surveyor General of Idaho, receipt was acknowledged of his letter dated July 10, 1901, inclosing the Governor's application, dated July 5, 1901. Directions were given to secure a statement, showing the total area of lands selected by the State, the approximate area of all the townships theretofore applied for by the Governor and also to report whether or not the total area of lands to which the State was entitled has been or might not be selected from the lands embraced in the townships already withdrawn. It was held that pending the receipt of a report from the Governor, no further action would be taken on the application for withdrawal for the reason that, in the opinion of the office, the areas embraced in the townships already withdrawn were sufficient to enable the State officers to make its requisite selections in full and that the public interests would not be subserved by further withdrawals of lands from settlement.

By letter "E", dated January 20, 1905, after referring to the Governor's application of July 5, 1901, and the lands included in his said application,

the local officers were instructed to withdraw from adverse appropriation by settlement or otherwise (except under rights that might be found to exist of prior inception) all the lands embraced in certain designated townships including that here in question for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plat of survey in the proper local land office.

A similar claim of the State to that here under consideration was the subject of departmental decision, dated April 29, 1913, (42 L. D. 118) on review, June 14, 1913 (42 L. D. 124), on appeal by the State of Idaho from the decisions of this office, dated August 23 and December 20, 1910, rejecting its school indemnity application, 02851, for certain tracts in T. 42, N. R. 4 E. for conflict with the selection of the Northern Pacific Railway Company list 33, under the act of March 2, 1899 supra. Said departmental decision, among other things, held that the withdrawal for the benefit of the State did not attach until July 15, 1901, the date the application was received in this office, and was not a bar to the reservation of the lands for forestry purposes, citing heirs of Irwin vs. State of Idaho, et al. 38 L. D. 219, and the opinion of the Attorney General, dated January 30, 1911, 39 L. D. 482.

This same application of the Governor of Idaho of July 5, 1901, under the said act of August 18, 1894, was involved in the case of Thorpe et al. v. State of Idaho, (35 L. D. 640) in which the Depart-

ment, in its decision, dated June 27, 1907, held (syllabus) that

> "The filing on behalf of the State of an application for the survey of lands under the act of August 18, 1894, and the publication of notice thereof as provided by the act, operate as a withdrawal thereof, and all settlements made subsequently are subject to the preference right of the State.
>
> "Notice to the local officers of the withdrawal of lands embraced in an application for survey by the State, as provided by the act of August 18, 1894, is intended primarily for their information, in order that proper notation may be made upon the records and is not essential to the protection of the rights of the state."

Substantially the same holding was made in Williams vs. State of Idaho (36 L. D., 20) on July 17, 1907. Motions for review of these decisions were denied June 4, 1908 (36 L. D. 479;481).

Upon the request of the State an order was issued suspending action upon said departmental decision of June 27, 1907, supra, pending a proposed adjustment of the claims of certain settlers, and the case again came before the Department March 22, 1913, upon the answer to the rule issued March 2, 1911, by the Secretary of the Interior inviting the State to show cause why certain school indemnity selections should not be rejected for invalidity of the bases assigned in support thereof. It was held by the department in its decision, dated March 22, 1913, (42 L. D. 15), syllabus:

> "Whatever doubt and uncertainty existed concerning departmental decisions in Thorpe, et al. v. State of Idaho (35 L. D. 640; 36 L. D. 436), and Williams vs. State of Idaho (36 L. D. 20, 481), respecting the right of the State of Idaho to select indemnity in lieu of school sections within the Coeur d'Alene Indian reservation, because of the decision of the Supreme Court of that State in Balderston vs. Brady et al, 107 Pac. Rep. 493) holding that school sections within Indian and other reservations were not valid bases for indemnity, having been removed by enactments of the State Legislature of February 8 and March 4, 1911 (Laws of Idaho, 1911, pp. 16, 85) and the later decisions of the Supreme Court of the State in Rogers v. Hawley et al. (115 Pac. Rep. 687, 692) said departmental decisions are relieved from suspension and will be carried into effect."

The case of Thorpe et al. vs. State of Idaho again came before the Department, March 10, 1914, on appeal by the State from the Commissioner's decision, dated May 19, 1913, rejecting the State's school indemnity selections of certain lands in T. 44, N., R. 2 E., upon the ground that while, at the time the State's application was filed, the selection of lands by the State in lieu of school sections within Indian reservations was unquestionably permitted by the act of February 28, 1891 (26 Stat. 796), the status of such base lands was changed by the act of Congress, approved June 21, 1906 (34 Stat. 335), providing for the opening to entry and disposition of the Coeur d'Alene Indian reservation lands, as secs. 16 and 36 thereof were granted by that act to the

State of Idaho for the support of public schools.

The Department, in its said decision of March 10, 1914, again reviewed the proceedings had under said act of August 18, 1894, and the departmental decisions above cited, and held that the record showed that the action of the Commissioner in failing to note the withdrawal on his record was not due to inadvertence but to his deliberate judgment that the application for withdrawal should be denied; that, on July 19, 1901, the Commissioner refused to withdraw the townships in question upon the ground that the areas embraced in previous withdrawals were sufficient to enable the State to satisfy its several grants; that no appeal having been filed from the action of the Commissioner, his decision became final; that the decisions of the Supreme Court of Idaho in Balderston vs. Brady (107 Pacific 493) and Rogers vs. Hawley (115 Pac. 687) determine, beyond question, that the State selections had no validity until their ratification and confirmation by the act of February 8, 1911, supra; that this act had no retroactive effect and in nowise impaired the rights of *bona fide* settlers upon these lands whose claims had attached long before.

Even if it be assumed that a withdrawal existed for the benefit of the State, in this case, under the act of August 18, 1894, supra, from the date of the filing of the Governor's application in this office, July 15, 1901, until the expiration of the period of sixty days after the filing of the township plat, during which time the State might exercise the

preference right of selection accorded to it by said act, yet, it must be held under the authority of the departmental ruling of March 10, 1914, in said case of Thorpe et al. vs. the State of Idaho, that the State Board of Land Commissioners were without authority to relinquish Secs. 16 and 36 in forest and other reservations prior to the passage of the act of the Legislature of February 8, 1911; that consequently, the selections here in question were not, on July 30, 1909, when presented, supported by valid bases, and that the State failed to properly exercise the preference right of selection accorded to it under said act.

The State school selections here in question, not being supported by valid bases when presented, on July 30, 1909, are accordingly hereby held for cancellation, subject to the usual right of appeal, and without prejudice to the right of the State to waive the right of appeal and file new selections for the tracts here in question not in conflict with the claims of the railway company and homestead claimants, designating valid bases therefor.

The question of the validity of the railway company's selection of unsurveyed lands, under the provisions of the acts of July 1, 1898 (30 Stat. 597-620) and said act of March 2, 1899, of the same character as the selection here in question, is before the Department for consideration in the case of Hanson, et al. vs. Northern Pacific Ry. and John Landers, et al. vs. said Company. Action upon the conflicting claims of the Railway Company and the

homestead settlers above mentioned will therefore, be suspended until the Department rules upon the question presented in the cases above referred to.

Notify the proper officers of the State of the action here taken and the representatives of the homestead claimants, and, in due time, report, observing circular of March 1, 1900, (29 L. D. 649). The resident attorneys for the Railway Company will be notified hereof by this office.

Very respectfully,

(Signature illegible)

Commissioner.

Exhibit 2-B, introduced by plaintiff consists in part of the following:

Department of the Interior,
General Land Office.

Oct. 1, 1915.

WHEREAS, by the Act of Congress approved July 2, 1864 (13 Stat., 365), entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route," and Joint Resolution of May 31, 1870 (16 Stat., 378), there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and branch, to the Pacific Coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate

sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;" and

WHEREAS, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first named act, have reported to him that the said Northern Pacific Railroad and Telegraph Line, and Branch, excepting that portion between Wallula, Washington, and Portland, Oregon declared forfeited by the Act of September 29, 1890 (26 Stat., 496), have been constructed and fully completed and equipped in the manner prescribed by the Act relative thereto, and the same accepted; and

WHEREAS, by the Act of Congress approved March 2, 1899 (30 Stat., 993), authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States the land within Mount Rainier National Park and Pacific Forest Reserve theretofore granted to said company, whether surveyed or unsurveyed, and to select in lieu thereof an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual Government survey thereof, lying within any State into or through which the railroad of said Company runs; and it is provided that patent shall issue to said Company for lands so selected; and

WHEREAS, the said lands lying within the

said Mount Rainier National Park and Pacific Forest Reserve, and the limits of the grant to said Railroad Company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior; and

WHEREAS, there has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the lawful successor in interest to the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the act of July 2, 1864, and all subsequent legislation; and

WHEREAS, the following described selected lands have been duly selected by the authorized agent of the Northern Pacific Railway Company, under the provisions of the Act of March 2, 1899, aforesaid, and the lands given as base therefor; the Mount Rainier National Park and former Pacific Forest Reserve, are within the primary limits of the company's grant and lie opposite the constructed line of its road, and are also within the limits of the reserve to the United States as aforesaid, to-wit:

(Here follows description of a number of tracts of land, aggregating 47.75 acres, including all of Section 20, Township 43, Range 4, 640 acres.)

RAILROAD GRANTS AND RIGHT OF WAY DIVISION

August 9, 1915.

It is hereby certified that the foregoing list has been examined in connection with the plats of record in this office, and that the tracts

therein described are vacant and unappropriated public lands and subject to approval and patent to the now Northern Pacific Railway Company under the act of March 2, 1899 (30 Stat. 993); that on September 19, 1912, the Department held that, under the adjustment of the company's claim, it is entitled to select 448,222 acres under the said act of March 2, 1899, and is relieved from the requirement of designating a tract for tract base therefor; that there has been heretofore patented to the company, under this adjustment, 378,947.95 acres, of which 2,462.37 acres have been recovered to the United States, leaving 376,485.58 acres of the base satisfied.

It is further certified that the tracts included in this list that are included in the act of February 26, 1895 (28 Stat., 683), and the supplemental act of June 25, 1910 (36 Stat., 379), were classified and approved as non-mineral; that all these tracts were classified as non-mineral as shown by the field notes of the General Land Office thereof, and have been reported on by the Geological Survey as containing no valuable deposits of coal or other minerals, and as having no valuable power site or reservoir possibilities.

Approved:

(Signed) WALTER S. BINLEY,

(Signed) F. R. DUDLEY Examiner.

Chief of Division.

ACCOUNTS DIVISION

September 24, 1915.

Expense of survey and office work on land described in the foregoing list:

Railroad selections, 4,700.75 acres

Field work	$215.21	
Office work at 1c per acre	47.01	
Total		$262.22

Act of June 25, 1910 not involved.

(Signed) FREDERIC NEWHUGH,
Chief of Division.

Now, Therefore, as it has been found that the foregoing selected lands, being a part of the 448,-222 acres to which the Northern Pacific Railway Company is entitled under the act of March 2, 1899, on account of its relinquishment accepted and approved July 26, 1899, of the lands lying within the primary limits of its grant and also within the Mt. Rainier National Park and Pacific Forest Reserve, are, so far as the returns to the General Land Office show, free from adverse claims and appear to be of the character contemplated by the said act of March 2, 1899, and to be subject to patent thereunder, and no objection appearing of record in this office, it is hereby recommended that the said selected tracts containing four thousand, seven hundred acres and seventy-five hundredths of an acre, be approved and patented to the said Northern Pacific Railway Company, the patent to contain a reservation in accordance with the proviso to the act of August 30, 1890 (26 Stat., 391).

(Signed) C. M. BRUCE,
Acting Commissioner.

To the Honorable
Secretary of the Interior.

Pat. No. 532360
June 6, 1916.

Department of the Interior,
Washington, D. C.
Oct. 4, 1915.

Approved: covering four thousand, seven hundred acres and seventy-five hundredths of an acre.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary of the Interior.

"B" List 425.

Exhibit "2-C" introduced by plaintiff, consists in part of the following:

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY
List No. 71.

State of Idaho.
U. S. Land Office at Coeur d'Alene.

The Northern Pacific Railroad Company and the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, having executed and delivered to the United States their certain deed, dated July 19, 1899, conveying and relinquishing to the United States certain lands situated within the limits of the Mount Rainier National Park and the Pacific Forest Reserve, as defined by the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as

the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," which Act was approved March 2, 1899, in pursuance of said Act of Congress above mentioned, now, by virtue of the right conferred upon the said Northern Pacific Railroad Company by said Act of Congress approved March 2, 1899, the said Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company, hereby selects the lands hereinafter specified in lieu of a like quantity of lands so relinquished and conveyed. The descriptions hereinafter set opposite the lands selected being assigned as the particular bases for the tracts hereby selected.

All the lands hereby selected are situated within the Coeur d'Alene land district, in the State of Idaho.

LIST OF LANDS North of base line and East of Boise principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park", in lieu of lands set opposite thereto, relinquished under said Act of March 2, 1899.

PART OF SECTION	Sec.	Town N	Range E	AREA Acres	100ths	REMARKS
The following tracts which when surveyed will be described as follows:						
* * * * * * * * * * * * * * * * * *						
8 All	20	43	4	640		
* * * * * * * * * * * * * * * * * *						

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

PART OF SECTION	Sec.	Town	Range	AREA Acres	100ths	REMARKS
The following tracts which when surveyed will be described as follows:						
* * * * * * * * * * * * * * * * * *						
8 All	21	17	8	640		
* * * * * * * * * * * * * * * * * *						

State of Minnesota,
County of Ramsey,—ss.

I, Wm. H. Phipps, being duly sworn, depose and say: That I am the Land Commissioner of the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company; that the lands described in the foregoing list, and which are hereby selected by the Northern Pacific Railway Company, under the Act of Congress approved March 2, 1899, entitled, "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and all of them, are vacant unappropriated lands of the United States, not reserved, and to which no adverse right or claim has attached, and have been found, upon examination, to be non-mineral in character; and said lands, and all thereof, are of the character contemplated by said Act of Congress approved March 2, 1899; and that the specific lands heretofore relinquished and conveyed to the United States by said Northern Pacific Railway Company, as successor in interest of the Northern Pacific Railroad Company, in lieu of which the lands herein described are selected, are truly set forth and described in this list, and no selection has heretofore been made in lieu of any of the lands herein specified as the basis for the lands hereby selected.

Subscribed and sworn to before me this 8th day of July, 1901.

W. F. VON DEYN,
Notary Public, Ramsey County, Minnesota.
(Notarial Seal.)

U. S. Land Office at Coeur d'Alene, Idaho,
Sep. 25, 1901.

We hereby certify that we have carefully

examined the foregoing selection list filed by the Northern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, under the Act of Congress approved March 2, 1899, entitled, "An act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and have critically examined the plats and records of this office, and that the lands selected appear by the records of this office to be subject to such selection; and said lands, and all of them, are public lands of the United States, not reserved, and to which no adverse right or claim has attached. We have therefore approved the foregoing list and the selection of the lands therein described, and have made due notation thereof upon the records of this office.

It is further certified that the foregoing list shows an assessment of the fees payable hereunder, and that said Northern Pacific Railway Company has paid to the undersigned, the receiver, the full sum of fifty-eight dollars in full payment and discharge of said fees.

(Signed) D. H. BUDLONG, Register.

(Signed) C. D. WAMER, Receiver.

(The foregoing list No. 71 is endorsed as follows:)

Filed July 23, 1901.

(Signed) D. H. BUDLONG,
Register.

Approved Sept. 25, 1901.

June 4, 1909. Serial No. 02484.

71-14

Act of March 2nd, 1899,

Describing Anew the Lands Selected in
Coeur d'Alene List No. 71 (In Part),
So as to Conform With the United States Survey
Thereof.

Filed June 4, 1909. Approved .....190...

Land Department
Northern Pacific Railway Co.
List No. 71 (In Part)
Of Selections of Public Lands Made by the
Northern Pacific Railway Company
As Inuring to It Under Grants of July 2, 1864, and
May 31, 1870, in the
Coeur d'Alene U. S. Land District, Idaho.

Coeur d'Alene List No. 71 (In Part.)

WHEREAS, by authority granted by an act of Congress entitled, "An act to set aside a portion of certain lands in the state of Washington, now known as the Pacific Forest Reserve as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, did on the twenty-third day of July, A. D. 1901, select in the United States District Land Office at Coeur d'Alene certain lands in township 43 North, range 4 east, Boise Meridian, as described in its selection list numbered 71, which said lands at the date of said selection were unsurveyed public lands; and

WHEREAS, by section four (4) of the act of congress hereinbefore referred to, it is provided that in case the lands selected thereunder be unsurveyed at the date of said selection, the company selecting the same shall within a period of three months after the lands so selected

have been surveyed and plats thereof filed by said local land office, file a new list describing the lands selected according to the Government survey.

NOW THEREFORE, in conformity with this provision and for the purpose of so describing said lands selected that they will conform to the government descriptions thereof according to said survey, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, does hereby describe anew the lands included in said selection list as follows, to-wit:

LIST OF LANDS North of base line and East of Boise principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled, "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," in lieu of lands set opposite thereto, relinquished under said act of March 2, 1899."

PART OF SECTION.	Sec.	AREA Town. N	Range. E	Acres.	100th.	REMARKS
* *						
8 All	20	43	4	640		
* *						

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled, "An act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

				AREA		
PART OF SECTION.	Sec.	Town.	Range.	Acres.	100th.	REMARKS.
Those certain tracts of land which when surveyed will be described as follows:						
* *						
			North	East	Will.	
8 All	21	17	8	640		
* *						

NORTHERN PACIFIC RAILWAY COMPANY.
By THOMAS COOPER,
Land Commissioner.

The foregoing list designating anew so as to conform with the public survey thereof, the lands selected in

Coeur d'Alene List No. 71 (In Part)

was filed in this office by the Northern Pacific Railway Company on the day of A. D. 1909.

Register.

Receiver.

DEPARTMENT OF THE INTERIOR,
United States Geological Survey.
Washington.

May 13, 1915.

Office of the Director.

The Commissioner,
General Land Office.

In reply to your letter of February 13, 1915 (Coeur d'Alene 02484 "F" Sel 71), requesting information relative to the mineral character and power-site or reservoir possibilities of the following lands in Idaho, included in Northern Pacific Railway Company selection:

T. 43 N., R. 4 E., Sec. 6, lots 6 and 7, E½ of SW¼;
Sec. 7, W½, W½ of E½;
Sec. 17, S½ of NW¼, S½;
Sec. 18, all;
Sec. 19, all;
Sec. 20, all;
Sec. 29, W½;
Sec. 30, E½.

The records of the Survey indicate that there are no valuable deposits of coal or other minerals within the area specified, and that the lands have no valuable power-site or reservoir possibilities.

H. C. RIZER (Signed)
Acting Director.

31-1

May 18, 1915 JFE

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington.

June 28, 1915.

Promulgating departmental decision, canceling state selections, etc.

State of Idaho,
Heirs of Charles E. Everson
and Martin Groundwater, Guar.
of John G. Groundwater,
v.
Northern Pacific Ry. Co.
Register and Receiver,
Coeur d'Alene, Idaho.

Sirs:

In reference to the above entitled case, involving lands in T. 43, N., R. 4 E., B. M., Idaho, you are advised that the decision of the Secretary of the Interior, dated January 19, 1915, has become final. A copy of said decision is herewith inclosed for your information and for your files.

Said decision affirmed, upon the authority of the case of Thorpe et al. v. State of Idaho (43 L. D., 168), and the case of McDonald v. Northern Pacific Railway Company, decided October

30, 1914 (unreported), the decision of this office, dated July 16, 1914, holding the State school indemnity selections, hereinafter more particularly described, for cancellation, subject to the usual right of appeal, and without prejudice to the right of the State to waive the right of appeal and file new selections for the tracts here in question not in conflict with the claims of the railway company and homestead claimants, designating valid bases therefor. It was also held that action upon the conflicting claims of the railway company and the homestead settlers therein mentioned would be suspended until the Department had ruled upon the questions therein presented.

The school indemnity selection lists involved are as follows:

State list 02700, covering all of Sec. 6, except lots 1 & 2;

State list 02705, covering all of Sec. 7;

State list 02708, covering the W½ and SE¼, Sec. 17, W ½NW¼, Sec. 29, and N½SE¼, Sec. 33;

State list 02706, covering all Sec. 18;

State list 02704, covering all Sec. 19;

State list 02604, covering all Sec. 20; and

State list 02699, covering the NE¼ and S½ Sec. 30, and NW¼ Sec. 31.

In accordance with the terms of said departmental decision and said office decision of July 16, 1914, the State selections described are hereby canceled and you are directed to make proper notation thereof on your records. The conflicting claims of the railway company and of the heirs of Charles E. Everson and Martin Groundwater, as the Guardian of John G. Groundwater, will be separately considered, the questions involved and referred to in said decision

of July 16, 1914, having now been decided by the Department.

Notify the proper officers of the State and the representatives of the homestead claimants of the action herein taken. The resident attorneys for the railway company will be notified hereof of by this office.

Very respectfully,

(Signed.) CLAY TALLMAN,
Commissioner.

Plaintiff's Exhibit "2-D" is in part as follows:

DEPARTMENT OF THE INTERIOR,
United States Land Office.
Coeur d'Alene, Idaho, Aug. 31' 1909.

Belden M. Delaney, Esq.,
Clarkia, Idaho.

Dear Sir:—

You are hereby notified that your homestead application serial No. 02539, filed June 10, 1909, for the NE¼, Sec. 20, T. 43, N., R. 4, E. B. M. is hereby rejected for the reason that the same is all in conflict with the selection by the State of Idaho.

30 days are allowed in which to appeal to the Commissioner of the General Land Office.

Yours truly,
W. H. BATTING,
Register.

DEPARTMENT OF THE INTERIOR,
General Land Office.
Washington, December 16, 1909.

In re rejected homestead application.

Mr. B. M. Delaney,
Saint Maries, Idaho.

Sir:

I am in receipt of your letter of November 15, 1909, in the nature of an appeal from the action of the local officers at Coeur d'Alene rejecting your application filed June 10, 1909, to make homestead entry for the N. E. ¼ of Sec. 20, T. 43, N. R. 4, E. B. M., because of conflict with school indemnity selection of the State of Idaho. It is gathered from your letter that for about six years you have worked in that region of country which embraces the particular township wherein said NE¼ of Sec. 20 lies, and that you have placed some improvements on the particular tract in question.

It appears, however, that said T. 43, N. R. 4 E. with a number of others was withdrawn from settlement or other appropriation adverse to the state, under date of July 5, 1901, upon application of the Governor of Idaho, under the act of August 18, 1894 (28 Stats. 394). The language of the statute is in part as follows:

> "And the lands that may be found to fall in the limits of such townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office."

Unless therefore, it could be shown that you were

a settler on said NE¼ of Sec. 20, prior to the date of the application for the withdrawal by the Governor, the State's rights to said tract, under its indemnity selection, is superior to yours, and since it appears that at the date of your application, said tract was covered by the State's list, your application was properly rejected by the local officers.

Very respectfully,

FRED DENNETT,
Commissioner.

Serial No. 02539.

DEPARTMENT OF THE INTERIOR,
United States Land Office.
At Coeur d'Alene, Idaho.

The annexed papers were filed the day and hour noted thereon.

Rejected Nov. 27, 1912, because homestead application was rejected for conflict with State selection. No appeal taken. No proof of publ.

W. H. BATTING,
Register.
WILLIAM ASHLEY,
Receiver.

Notice, etc.

Feb. 25, 1913, Proof finally rejected.

S-41

In reply please refer to "F" Coeur d'Alene 02539 WJI

1xB&G
1xS&H

WJI DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington.

July 9, 1915.

Address only the
Commissioner of the General
Land Office.

B. M. Delaney
vs.
Northern Pacific Ry. Co.

Register and Receiver,
Coeur d'Alene, Idaho.

Sir:

Homestead Application Held for Rejection.

June 10, 1909, B. M. Delaney filed his homestead application for the NE¼ of Sec. 20, T. 43 N., R. 4 E., Idaho, alleging settlement thereon, June 21, 1903, which application was rejected by you for conflict with state selection for indemnity school purposes and with selection of the Northern Pacific Railway Company, list 71.

Letter of November 15, 1909 in the nature of an appeal from your action in rejecting said application was transmitted to this office.

The plat of survey of said T. 43 N., R. 4 E., was approved, November 24, 1908 and filed in the local office, June 4, 1909.

The State of Idaho filed indemnity school selection, list 02604, August 19, 1909, including said NE¼, claiming a preference right under the act of August 18, 1894 (28 Stat., 394), which list was canceled June 28, 1915.

July 23, 1901, the Northern Pacific Railway Company selected said NE¼ with other lands per list 71, under the act of March 2, 1899 (30 Stat., 993). June 4, 1909, the Railway Company filed a re-arranged list describing the tracts according to the government survey, as required by said act of March 2, 1899.

Inasmuch as the land was duly selected by the

Railway Company prior to the date of the alleged settlement and date of filing the application and conformed to the survey within the time allowed, it was not subject to entry at the time the application was filed, Frank O. Daniel vs. Northern Pacific Railway Company (43 L. D., 381.)

Your action in rejecting said application is hereby sustained, subject to the usual right of appeal.

The resident attorneys for the Company and applicant will be notified direct by this office.

Very respectfully,

C. M. BRUCE (Signed)
Assistant Commissioner.

D-31156

DEPARTMENT OF THE INTERIOR,
Washington, November 18, 1915.

Belden M. Delaney
vs.
Northern Pacific
Railway Company.

"F"
Coeur d'Alene 02539
Homestead application held
for cancellation.
Affirmed.
Decision promulgated
Nov. 22, 1915.

APPEAL FROM THE GENERAL LAND OFFICE

By its decision of July 9, 1915, the General Land Office hold for cancellation the homestead application of Belden M. Delaney, Coeur d'Alene 02539, for the N. E. ¼ Sec. 20, T. 43, N. R. 4 E., for the reason that his settlement, upon which his application to

enter was based, was not made until after the Northern Pacific Railway Company had filed its selection list No. 71, Coeur d'Alene 02484, for the same land, under the Act of March 2, 1899 (30 Stat. 1095).

In his appeal Delaney urged that the selection did not defeat his settlement because it was erroneously received and filed in the local office, and is inoperative for the reason that an application had been made by the State of Idaho, prior to the date on which the list was filed, for the survey of the township in which the land is located, under the act of August 18, 1894 (28 Stat. 394) and was pending at the time the list was filed, and therefore, prevented the acceptance and filing of the list.

This contention is contrary to the holding of this Department in the closely kindred case of Swanson v. Northern Pacific Railway Company (37 L. D. 74).

The decision in that case is in harmony with the established practice of the land department, which sanctions the receipt and filing of applications for lands while they are subject only to mere preferred rights and appropriations. (Stewart v. Peterson, 28 L. D. 515, 519).

But aside from this consideration, the rejection of the application in this case is supported by the reasons given by this Department in its decision in the cases of Thorpe et al. v. Northern Pacific Railway Company (43 L. D. 167) F. O. Daniels v. The Northern Pacific Railway Company (43 L. D. 381), and George A. McDonald v. The Northern Pacific Railway Company (D-15548) involving Lewiston 02620,

decided October 30, 1914 (unreported) wherein the issues and facts presented were very similar to those presented in this case.

The decision appealed from is affirmed and the case remanded with directions that Delany's application to enter be finally rejected.

(Signed.) ANDRIEUS A. JONES,
First Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
Washington.

January 29, 1916.

D-31156
Belden M. Delany
vs.
Northern Pacific Railway Co.

"F"
Coeur d'Alene, 02539
Motion for rehearing.
Denied.

MOTION FOR REHEARING IN RE DEPARTMENTAL DECISION OF NOVEMBER 18, 1915.

Motion for rehearing has been filed on behalf of the above plaintiff of departmental decision of November 18, 1915, wherein the Department affirmed the action of the Commissioner rejecting his homestead application for conflict with a selection by the Northern Pacific Railway Company for the same lands, under the act of March 2, 1899. (30 Stat., 1095).

The questions raised in the motion for rehearing

were all considered by the Department, and disposed of in the decision complained of, and no further discussion of the facts is deemed necessary.

The motion for rehearing is accordingly denied.

(Signed.) ANDRIEUS A. JONES,
First Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington.

February 11, 1916.

Departmental Decision Promulgated.

Register and Receiver,
Coeur d'Alene, Idaho.

Sirs:

I enclose herewith a copy of Departmental decision of January 29, 1916, denying the motion for rehearing of departmental decision of November 18, 1915, which affirmed office decision of July 9, 1915, holding for rejection the homestead application of Belden M. Delany, for the NE¼ Sec. 20, T. 43 N., R. 4 E., Idaho, for conflict with the selection of the Northern Pacific Railway Company, per list 71.

The homestead application of Delany is hereby finally rejected, and you will so note upon the records of your office.

The resident attorneys for the company and the applicant will be notified direct by this office.

Very respectfully,

(Signed.) C. M. BRUCE,
Assistant Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington.

March 11, 1916.

D-31156
Belden M. Delany
vs.
Northern Pacific Railway Co.

"F"

Coeur d'Alene 02513
Petition Denied.

PETITION TO THE SUPERVISORY POWER.

Belden M. Delany filed petition for exercise of supervisory power of the Secretary of the Interior to vacate and recall departmental decision of November 18, 1915, and that of January 29, 1916, denying his motion for rehearing in the case between him and the Northern Pacific Railway Company, involving his settlement claim to NE. ¼, Sec. 20, T. 43 N., R. 4 E., B. M., Coeur d'Alene, Idaho, on the ground of the railway company's prior right as selector.

The ground of the petition is that the selection of the land in terms of a future survey made in the company's prior selection is illegal and void under the clear and unmistakable language in the decision in Daniels v. Northern Pacific Ry. Co. (43 L. D., 381). There is also a contention that the Northern Pacific Railroad Company had been foreclosed and had gone out of existence before this selection was made and before the act of March 2, 1899 (30 Stat., 993), wherefore it is claimed the act was ineffective for want of an existing grantee.

Counsel misinterprets the decision in 43 L. D., 381, referred to. The Department held that:

> Not only have descriptions of unsurveyed land in terms of a future survey been recognized in departmental practice, but, as has been stated, such descriptions are required by the regulations now in force as an essential part of the description in all applications for unsurveyed land. Indeed, in the instructions of May 9, 1899 (28 L. D., 521), under the act of June 4, 1897, *supra*, was incorporated a provision broad enough to cover all selections of unsurveyed land under any act of Congress in which the only requirement as to description was that the land should be designated according to the description by which it would be known when surveyed, if that be practicable.

The act of March 2, 1899, authorized the railroad company to make selections of unsurveyed public lands. Section 4 requires that in case the tract selected should at the time of the selection be unsurveyed the list filed by the company in the local land office should describe the tract "in such manner as to designate the same with a reasonable degree of certainty," and requires a new list to be filed redescribing the land after the survey has been made. The description employed in this particular selection, under the decision in Daniels v. Northern Pacific Railway Company, *supra*, complied with the statute as it was made with a reasonable degree of certainty. The petitioner's contention as to this feature of the case is accordingly not well founded.

The second point of contention, if conceded, would

work ruin over the entire northwest in all the states through which the Northern Pacific Railway Company passes. It would nullify the acts of March 2, 1899, and July 1, 1898 (30 Stat., 620), for both acts name the Northern Pacific Railroad Company as authorized thereby to make selections. It is true the railroad company had ceased to be an active corporation by foreclosure of all its rights and franchises and sale to its bondholders who reorganized under the name of the Northern Pacific Railway Company, and that company, as successor to the railroad company, has been recognized in the opinion of the Attorney General, February 6, 1897 (21 Op., 486), and March 18, 1905, referred to in departmental decision (33 L. D., 636). It has also been recognized in numerous departmental decisions, among which are Furgeson v. Northern Pacific Ry. Co. (33 L. D., 634, 636); Jones v. Northern Pacific Ry. Co. (34 L. D., 105, 106); Northern Pacific Ry. Co. vs. Santa Fe Pacific R. R. Co. (36 L. D., 368, 369); Vold v. Northern Pacific Ry. Co. (30 L. D., 378); Duba v. Northern Pacific Ry. Co. (42 L. D., 464-5).

The Department will not now hold that the act of March 2, 1899, *supra*, was void because no such corporation as the Northern Pacific Railroad Company was then a going concern.

The petition is denied.

(Signed.) ANDRIEUS A. JONES,
First Assistant Secretary.

The papers constituting a part of Plaintiff's Ex-

hibit 2-D above copied, and other papers which are a part of that exhibit and which it is not deemed necessary to include in this abstract, sufficiently show that the official plat of the survey of the township in which the land in controversy was situated, was filed in the local land office at Coeur d'Alene, Idaho, on June 4, 1909; that on June 10, 1909, Belden M. Delany made application to enter the land in controversy as a homestead, alleging that he made settlement on said land June 21, 1903; that said application was rejected by the Register and Receiver of said Coeur d'Alene land office; that on August 31, 1909, the said Register addressed to said Delany the notice of rejection bearing that date which is copied above; that Delany thereafter appealed to the Commissioner of the General Land Office; that said Commissioner, acting on this appeal and by the decision of July 9, 1915, which is copied above, affirmed the action of the Register and Receiver and rejected Delany's application; that thereafter Delany appealed to the Secretary of the Interior from said decision of the Commissioner of the General Land Office, and by decision of November 18, 1915, copied above, the Secretary affirmed the decision of the Commissioner appealed from; that Delany thereupon moved the Secretary of the Interior for a rehearing, and by the decision of January 29, 1916, copied above such motion was denied by the Secretary; and that thereafter Delany petitioned the Secretary of the Interior for the exercise of his supervisory power, and such peti-

tion was denied by the Secretary's decision of March 11, 1916, copied above.

Defendant's Exhibit No. "1" is as follows:

Patent No. 108.

Northern Pacific Railway Lands.

Act March 2, 1899.

Coeur d'Alene and Lewiston Land Districts, Idaho.

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, greeting:

WHEREAS, by the act of Congress approved July 2, 1864, (13 Stat., 365), entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route," and the Joint Resolution of May 31, 1870 (16 Stat., 378), there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and branch, to the Pacific Coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;" and

WHEREAS, official statements from the Secretary

of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first named act, have reported to him that the said Northern Pacific Railroad and Telegraph Line, and Branch, excepting that portion between Wallula, Washington, and Portland, Oregon, declared forfeited by the Act of September 29, 1890 (26 Stat., 496), have been constructed and fully completed and equipped in the manner prescribed by the Act relative thereto, and the same accepted; and

WHEREAS, by the Act of Congress approved March 2, 1899 (30 Stat., 993), authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States the land within Mount Rainier National Park and Pacific Forest Reserve, theretofore granted to said Company, whether surveyed or unsurveyed, and to select in lieu thereof an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual Government survey thereof, lying within any State into or through which the railroad of said Company runs; and it is provided that patent shall issue to said Company for lands so selected; and

WHEREAS, the said lands lying within the said Mount Rainier National Park and Pacific Forest Reserve, and the limits of the grant to said Railroad Company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior, and

WHEREAS, There has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the

lawful successor in interest to the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the Act of July 2, 1864, and all subsequent legislation; and

WHEREAS, the following described selected lands have been duly selected by the authorized agent of the Northern Pacific Railway Company under the provisions of the Act of March 2, 1899, aforesaid, and the lands given as base therefor, the Mount Rainier National Park and former Pacific Forest Reserve, are within the primary limits of the Company's grant, and lie opposite the constructed line of its road, and are also within the limits of the reserve to the United States, as aforesaid, to-wit:

Boise Meridian—Idaho.

Township forty-three north of Range four east. *** Section twenty. *** (And other lands.)

Containing in the aggregate four thousand one hundred forty-two and sixty-seven-hundredths acres:

NOW KNOW YE, That the United States of America, in consideration of the premises, and pursuant to said Acts of Congress, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, its successors and assigns, the tracts of land selected as aforesaid and embraced in the foregoing; TO HAVE AND TO HOLD the said tracts, with the appurtenances thereof, unto the said Northern Pacific Railway Company, successor as aforesaid, and to its successors and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water

rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

This patent is issued in lieu of patent No. 493369, dated October 11, 1915, which has been canceled because of an error in the description.

IN TESTIMONY WHEREOF, I, Woodrow Wilson President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the Sixth day of June in
(SEAL.) the year of our Lord one thousand nine hundred and Sixteen and of the Independence of the United States the one hundred and Fortieth.

By the President: Woodrow Wilson

By M. P. LeRoy, Secretary.

L. I. C. LAMAR,

Recorder of the General Land Office.

Record of Patents,
Patent Number 532360.

Defendant's Exhibit No. "2" is as follows:

DEPARTMENT OF THE INTERIOR

General Land Office,

Washington, D. C., January 20, 1905.

Subject:

Notice of withdrawal of lands under Governor's application for survey under Act of August 18, 1894.

Register and Receiver,
Coeur d'Alene, Idaho.

Sirs:

With the letter of the Governor of Idaho, dated August 18, 1904, was received at this office a copy of "Notice for survey of lands," dated Boise, Idaho, July 6, 1901, as applied for by F. W. Hunt, Governor, under act of August 18, 1894, the townships being designated as follows:

Townships 40, 41 and 42 north, Range 5 east;
" ....41 and 42 north; Range 4 east;
" ....43 north, ranges 2, 3 and 4 east;
" ....44 north, ranges 2, 3, 4 and 5 east;

Of said designated townships 41 north, range 4 east; 43 north, ranges 2 and 3 east, and 44 north, range 2 east were withdrawn from further disposal by settlement or otherwise per office letter "E" of March 29, 1899, to the proper district land officers. Except as stated the townships designated in the Governor's application of July 6, 1901, were not heretofore withdrawn. Township 45 north, range 5 east, and embraced in contract No. 250, was withdrawn March 29, 1899.

Under date of December 20, 1904, the State of Idaho made special deposit of $20,000, under the act of August 18, 1894, to cover the cost of surveys embraced in applications for survey as made by the Governor; and the surveys were embraced in contracts Nos. 249 and 250, awarded Messrs. G. R. and W. A. B. Campbell and Charles L. Campbell, D. S., respectively; liabilities payable from the stated deposits; contracts approved January 18, 1905.

You are hereby instructetd to give public notice, by posting in your office and as a matter of information to newspapers published in the vicinity, that the lands embraced in townships 41, 42, 43 and 44 north, range 6 east; 41 north, range 5 east; 42 north, range 5 east; and 43 and

44 north, range 4 east, are reserved from any adverse appropriation by settlement or otherwise (except under rights that may be found to exist of prior inception) from and after the date of the approval of said contracts Nos. 249 and 250, namely, January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of the survey of the designated townships in your office or the proper local land office, during which period the State authorities may select any of the lands situate in said townships which are not embraced in any adverse claim.

A letter similar to this has been addressed to the district land officers at Lewiston the lands being situate in the two districts.

Note on your records the suspension of such of the designated townships as are situate within your district, and acknowledge receipt hereof.

You will observe from the foregoing statements that under the Governor's application of March 15, 1899, the following designated townships (and partially embraced in the two awarded contracts), were withdrawn from disposal by settlement or otherwise March 29, 1899, by letter "E" to the respective district land officers, viz:

Townships 41 north, ranges 3 and 4 east; 42 and 43 north, ranges 2 and 3 east; 44 north, ranges 1 and 2 east; and 45 north, ranges 3, 4, and 5 east.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Defendant's Exhibit No. "3" is as follows:

DEPARTMENT OF THE INTERIOR
Washington.

October 30, 1914.

D-15548

George A. McDonald,
v.
Northern Pacific Railway Company, and State of Idaho.

Decision Promulgated
Nov. 13, 1914.

"F"

Lewiston 02620.
State selection and homestead application rejected.
Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE

On July 11, 1901, the Northern Pacific Railway Company applied to select under the act of March 2, 1899, (30 Stat. 993), the S½, SE¼, Sec. 30, and N½ NE¼, Sec. 31, T. 42, N., R. 4 E., Lewiston, Idaho, land district. Prior to the filing of this application, to-wit, July 6, 1901, the State of Idaho, through its Governor, applied to have the lands in this township surveyed, and also on the same date filed an application for the withdrawal of these lands from all forms of settlement and entry, under the act of August 18, 1894 (28 Stat. 394).

Upon consideration of this application, the Commissioner of the General Land Office refused to make said withdrawal upon the ground that sufficient land had already been withdrawn to satisfy the State's claim. Subsequently, and on January 20, 1905, the Commissioner considered the application filed by the State, and

withdrew the land for the state. The township plat was filed in the local office July 1, 1909, and the Railway Company's selection was adjusted to these lines of survey. On the date the township plat was filed, George A. McDonald filed application to make homestead entry of said tract, and on August 27, 1909, the State filed its selection.

The land was temporarily withdrawn for forestry purposes March 31, 1905, and was included in a forest withdrawal in 1906. On the foregoing statement of facts, the Commissioner in his decision of December 20, 1910, rejected the State's application upon authority of the decision of his office rendered December 20, 1909, in the case of the State of Idaho v. Northern Pacific Railway Company, wherein he held that the act of the legislature of the State of Idaho prohibited the use of Sections 16 and 36 as bases for lieu selections. Said decision also held the application of McDonald for rejection because of conflict with the prior selection of the Northern Pacific Railway Company. From this action the State has appealed.

Until January 20, 1905, the lands under consideration, occupied the status of those involved in the case of Thorpe et al. v. State of Idaho (43 L. D. 168), wherein the Department upheld the authority of the Commissioner to refuse to make the withdrawal for the State. It follows, therefore, that the withdrawal on behalf of the State did not take effect until January 20, 1905. as the doctrine of relation cannot be applied where the Commissioner advisedly refused to make the withdrawal at the time application thereof was filed. Prior to January 20. 1905, the railway company had made selection of these lands, and its right is superior to that of the State. For the reasons hereinbefore stated, the

judgment of the Commissioner is hereby affirmed.

(Signed.) A. A. JONES,
First Assistant Secretary.

Counsel having stipulated that the foregoing abstract of the evidence contains all the matter necessary and material for the consideration of any question raised on the appeal herein, and such stipulation being deemed to be correct, it is therefore ordered that the said transcript be and it is hereby settled and allowed as the statement of the evidence.

Dated at Boise, Idaho, this 14th day of November, 1918.

FRANK S. DEITRICH,
Judge.

Endorsed, Filed Nov. 14, 1918.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)
No. 660.
STIPULATION.

It is hereby stipulated and agreed by and between counsel for all of the parties hereto, that the foregoing abstract of evidence contains all of the evidence heard on the trial of the above entitled cause which is material for the consideration of any questions raised on the appeal of said cause, and the same may be settled and certified by the Court as an abstract of so much of the evidence that is necessary for the proper consideration of all the questions raised on

the appeal of said cause.

A. H. KENYON,
S. M. STOCKSLAGER,
Counsel for Plaintiff in Error.

STILES W. BURR AND
HORACE H. GLENN,
SKUSE & MORRILL,
Counsel for Defendant, Edward Rutledge Timber Company.

CHAS. W. BUNN,
CANNON & FERRIS,
Counsel for Defendant, Northern Pacific Railway Company.

Endorsed, Filed Nov. 14, 1918.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)
No. 660.
DECISION

July 1, 1918.

A. H. Kenyon and S. M. Stockslager, Attorneys for Plaintiff.

Stiles W. Burr, Skuse & Morrill, Attorneys for Edward Rutledge Timber Company, Defendant.

Cannon & Ferris, Attorneys for defendant Northern Pacific Railway Co.

DIETRICH, DISTRICT JUDGE:

The issues are greatly reduced by the decision in West v. Edward Rutledge Timber Company, (244

U. S. 90, 221 Fed. 30, 210 Fed. 189), a case arising in the same locality and out of the same general conditions. The relief sought is of the same character in both cases, and the facts are so similar that they need not be stated in full. The land in controversy is the Northeast Quarter of Section 20, Township 43 North, Range 4 East of Boise Meridian. It was patented to the Northern Pacific Railway Company in 1916, and by it conveyed to its co-defendant, the Edward Rutledge Timber Company. Plaintiff contends that in law her ancestor, Beldon M. Delaney, was entitled to patent by virtue of his homestead settlement, and that the defendants hold the title in trust for her. Prior to 1909 the land was unsurveyed. Delaney, having purchased the improvements erected by a preceding occupant, made settlement in 1903, and in 1909, when the land was surveyed, he made application to enter, and later, on November 20, 1912, submitted his final proof. Both the application and the tender of final proof were rejected by the land office.

1. Delaney's acts of settlement and residence are far from satisfactory, and I have great hesitancy in holding them sufficient. True, the showing is not radically different from that in the West case, but in that case the amount cleared and cultivated was thought to be "pathetically small," and, however broad our sympathy for the settler, a line must be drawn somewhere. I am not at all sure that the land officials would have found the showing sufficient had they considered the final proof, but

inasmuch as their rejection was upon other grounds, I shall, in the further consideration of the case, assume that the residence and improvements met the requirements, under the liberal policy prevailing in the Land Department, and that the final proofs would have been accepted but for other conditions upon which the land officials acted.

2. The description in the railroad company's selection list was in terms of future survey, as in the West case, and while the distance to the surveyed lands is a little greater, the difference is not such as to warrant a holding that as a matter of law the description was insufficient to designate the land "with a reasonable degree of certainty." Within reasonable limits, it is a question of fact in any case whether such a description is sufficiently certain, and a finding thereon by the Land Department within such limits will not be disturbed by the courts.

3. The remaining point, argued with great earnestness by both sides, was in no wise involved in the West case, and requires a brief statement of fact. The defendant Railway Company filed its selection lists, under the exchange provision of the act of March 2, 1899, (30 Stat. 993), on July 23, 1901, about a year before settlement by any person. A few days prior to such selection, however, the State of Idaho had made application for the survey of a large body of land, including that in controversy, under the provisions of the Act of August 18, 1894, (28 Stat. 373, 394), and the question is, whether

the proceedings taken by the State prior to July 23rd operated so far to withdraw the land from the public domain that it could not be selected by the Railroad Company either absolutely or conditionally. By the Land Department the question was answered in the negative, first, because there was no valid, effective application for survey before the Railroad Company filed its selection list, and, second, because by the settled construction of the Department, lands, even though embraced in a valid application for survey by the State, may be selected by a railroad company subject to the state's preference right. Such preference right the State has here failed to assert, and no claim upon its part is presently involved.

Under the act of 1894 it is provided that (a) the application for survey must be made by the governor of the state to the "Commissioner of the General Land Office," (b) notice of the withdrawal or reservation of the land is to be immediately given by the Commissioner to the Surveyor General of the State, and to the district Land Office, and, (c), within thirty days from the filing of the application the Governor of the State must give notice of the application by publication for thirty days in a local newspaper. The lands so to be surveyed "shall be reserved, upon the filing of the application for survey, from any adverse appropriation, by settlement or otherwise, except under rights that may be found to exist of prior inception for a period to extend from such application for survey until the expiration of

sixty days from the date of filing the township plat" in the proper district Land Office.

On July 8, 1901, the Governor of Idaho filed with the Surveyor General an application bearing date July 5th, for the survey of eighteen townships, including Township 43 North, Range 4 East, and by the Surveyor General the application was sent to the Commissioner of the General Land Office, by whom it was received July 15th. It is clear, I think, that the application did not become effective for any purpose until it reached the General Land Office, and such is the holding of the Land Department. A notice bearing date July 6th was published in six weekly issues of a local paper, the first publication being on July 10th, and the last on August 14th. Assuming that the first effective publication was that of July 17th, two days after the receipt of the application by the Commissioner, I am inclined to the view that sufficient notice was given to meet the requirements of the law; the publication was made in every issue of the paper published during the thirty-day period following the filing of the application.

As already stated, the application was for the survey of eighteen townships, or approximately 403,000 acres, and other applications of a similar character were pending. Taking cognizance of the vast area thus applied for, and of the limited right of selection remaining in the State, the Commissioner, on July 19, 1901, considered the application in question to be excessive, and declined to recognize it. No appeal having been taken by the State from his ruling,

the same became final and binding, provided, of course, that the Commissioner was acting within his jurisdiction. The application having been declined, no notice of its filing was given to the district Land Office, and no notation was ever made upon the township plats in that office or upon any of its records, of the reservation or withdrawal of the land. Such was the status of the application and of the Land Office records, when, upon July 23rd, the Railroad Company filed its selection lists. Later, in January, 1905, it seems that as a result of certain supplementary proceedings, the General Land Office recognized the preference right of the State, but only from January 18, 1905, not from July 15th, 1901, as appears from a letter of date January 20, 1905, from the Commissioner to the Register and Receiver of the district Land Office, by which the latter officers were directed to give notice of the reservation of certain townships, including 43-4, "from and after * * * January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office * * * during which time the state authorities may select any of the lands situated in said township, which are not embraced in any adverse claim."

Upon the question of the power of the Commissioner to reject an application for survey, the act of 1894 is equivocal, and the rulings of the Land Department have not been entirely uniform, the later decisions, however, being in support of such juris-

diction. *N. P. R. R. Co. v. Idaho,* 39 L. D. 583. *Thorpe v. Idaho,* 43 L. D. 168. *State vs. Roberson,* 44 L. D. 448.

(Also the decision herein involved.)

The language of the act, it is thought, is more readily susceptible to the construction adopted in the first decision, but in practical administration such a meaning gives rise to the most serious difficulties. In that view, a state with an unsatisfied grant of a thousand acres could by the very simple and inexpensive process of filing an application in the General Land Office and publishing a notice for thirty days, withdraw from entry the entire area of public land, however great, within the state. Is it possible that Congress contemplated or intended such a result? By the terms of the act, the application for survey must be made only "with a view to satisfying the public land grants * * * to the extent of the full quantity of land called for" by the granting acts. Is not the right, therefore, to be regarded as commensurate with the needs of the state? I am not suggesting that the amount applied for cannot in any case properly exceed the unsatisfied grant. The application must be for an entire township, whereas a smaller amount might be sufficient to satisfy the grant. But giving consideration to the extent of the grant and the character of the lands, and the interest of the Government in having its public lands disposed of and not needlessly withdrawn from entry, it is thought that the area to be surveyed must bear some reasonable relation to the area the state

has the right to select. Such being the extent of the right or privilege conferred upon the state, it follows that an application for an excessive survey, being unauthorized, is ineffective, and it is for the officers of the Land Department, charged, as they are, with the sale and disposition of public lands, to determine whether in any given case the application is within the law. In any other view I am unable to see how the interest of the Government can be protected. If therefore in fact the application under consideration was found to be excessive, the Commissioner of the General Land Office did not exceed his jurisdiction in declining to recognize it, and in refusing to take any steps to carry it into effect.

It is further contended by the plaintiff that, defective though it may have been, the application served to withdraw the land from the operation of the act of 1899, reference being had to the familiar principle that the segregative effect of an entry or other selection is not necessarily dependent upon its inherent validity. *Holt v. Murphy*, 207 U. S. 407. *McMichael v. Murphy*, 197 U. S. 304. *Hodges v. Colcord*, 193 U. S. 192. *Sturr v. Beck*, 133 U. S. 541. *Edith G. Halley*, 40 L. D. 393. If, however, as is held, the Commissioner of the General Land Office had the power to reject it, the application never became operative for any purpose. To have segregative effect, an invalid application or entry must in some way be accepted or recognized by the Land Department; having been allowed, even though erroneously, it is binding upon and segregates the land. But

here at the very outset there was a declination to recognize the application. If, however, we assume that the application was valid, and that the Commissioner was without power to reject it, it must be borne in mind that it constituted no offer to enter the land, but amounted only to a request to have it surveyed. The land was not entered or selected; the State made no specific claim, and it might ultimately decide not to select a single subdivision. True, the terms "reserved" and "withdrawn" are used in the act, but when we consider its intent and purpose, clearly the only effect contemplated was to confer upon the State a preference right to select, at its option. By the filing of the application the State initiated no claim or right to any portion of the land. As has been very properly held by the Land Department, I think, the position of the State is closely analagous to that of a successful contestant after the cancellation of record of the contested entry. The land embraced in such entry is, as a result of the cancellation, fully restored to the public domain, and is no longer segregated or reserved, but the contestant possesses the preference right of entry. Accordingly, following the practice in relation to such contested entries, the Department holds that the pendency of such preference right does not operate to prevent the filing of other applications, subject to such preference right. *Stewart v. Peterson*, 28 L. D. 515. *Cronan v. West*, 34 L. D. 301. *State v. N. P. R. R. Co.*, 37 L. D. 70. *Swanson v. N. P. R. R. Co.*, 37 L. D. 74. *Delaney v. N. P. R. R. Co.*, (unreport-

ed, decision Nov. 18, 1915). No good reason is apparent for holding such a practice illegal. Our attention is directed to the language of the act of March 2, 1899, creating and defining the limits of the right of the railroad company to select, wherein it is authorized "to select, in exchange for lands relinquished by it, an equal quantity of non-mineral public lands * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection," etc. But this language does not alter the question. Neither can a citizen rightfully settle upon or enter land unless it be public land, not reserved, and to which no private rights have attached or been initiated, etc. And yet the plaintiff asserts the right of her predecessor to settle upon and claim the land in controversy long after the state filed its application, and after the railroad company filed its selection. The right of the railroad company to select is quite as broad as the right of the citizen to "homestead". As already suggested, by its application for survey the state initiated no claim to this land; it was merely given a certain length of time to determine whether it would make such claim, and while the term "reserved" is used, plainly there is no reservation in the ordinary sense, as for some governmental purpose. The moment the preferential period in favor of the state expires, the lands may be entered by any qualified person, the same as in the case of other public lands.

In view of these considerations, it is thought that

the Land Department acted upon a proper construction of the law and accordingly the plaintiff's bill will have to be dismissed, and such will be the order.
Endorsed, Filed July 1, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 660.
DECREE.

The above entitled cause having come on to be heard, the complainant appearing by her solicitor, A. H. Kenyon, and defendants appearing by their solicitors, Stiles W. Burr, John J. Skuse, Fred B. Morrill and Edward J. Cannon, and having been submitted to the court upon the pleadings herein, and upon proof taken in open court, and said cause having been argued by counsel, and the court being advised, it is on motion of counsel for defendants,

ORDERED, ADJUDGED AND DECREED,

That bill of complaint of the complainant herein, be, and it is hereby dismissed for want of equity, and; it is further,

ORDERED, ADJUDGED AND DECREED,

That defendants have and recover their costs and disbursements herein.

Dated this 20th day of September, 1918.

BY THE COURT,
FRANK. S. DIETRICH,
Judge.

O. K. as to form.
A. H. Kenyon,
Solicitor for plaintiff.
Endorsed, Filed Sept. 20, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 660.

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

The above named plaintiff, Alra G. Farrell, conceiving herself aggrieved by the judgment entered on the 20th day of September, 1918, in the above entitled cause, doth hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, and she prays that this, her appeal, may be allowed; that a transcript of the record, proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

A. H. KENYON,
S. M. STOCKSLAGER,
Attorneys for Plaintiff.
Old National Bank Bldg.,
Spokane, Washington.

And now, to-wit, on the 14th day of November, 1918, IT IS ORDERED, that the appeal be allowed as prayed for and that the amount of bond on said

appeal be, and it hereby is, fixed at Two Hundred Dollars.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Nov. 14, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 660.
ASSIGNMENTS OF ERRORS.

Comes now the above named plaintiff, Alra G. Farrell, and in connection with her appeal makes the following assignments of error which she avers were committed by the Court in the trial of this cause, and upon which she will rely in the prosecution of her appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Ninth Circuit:

I.

The Court erred in finding and deciding that the description in the Railroad Company's lieu selection list in terms of future survey were sufficient to designate the lands with a "reasonable degree of certainty", as required by the act of March 2nd, 1899, when applied to the facts established on the trial of this cause, and in applying the rule in the West case to the case at bar: (Andrew West, vs. N. P. Ry. Co. et al)

And also in finding and deciding that under the facts shown the question of whether or not the land

was described with a "reasonable degree of certainty", was a question of fact only.

II.

The Court erred in finding, holding and deciding that the State of Idaho did not initiate any claim or right to the lands in controversy by the filing of its application for survey under the Act of August 18th, 1894; and in holding and deciding that the Railway Company could make a valid selection of the lands in controversy while the application of the State of Idaho to select was still pending, which right of the Railway Company was "subject to the right of the State to select."

III.

The Court erred in finding, holding and deciding that Beldon M. Delany, the deceased entryman, as the successful contestant did not have a preference right of entry of the lands in controversy under the homestead laws of the United States as against the defendant Railway Company, by reason of being the successful contestant over the State of Idaho, in the contest for same before the Land Office; and in holding and deciding that such preference right of entry on the part of Delany did not operate to prevent the filing of the Railway Company's selection list so as to prevent the Railway Company from acquiring a right to select subject to such preference right on the part of Delany.

IV.

The Court erred in rendering judgment in favor of the defendants, and against the plaintiff.

WHEREFORE, plaintiff prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said Court be directed to set aside the judgment heretofore rendered in favor of the defendants and render judgment in favor of the plaintiff, to the effect that the defendants hold the title to the real estate described in plaintiff's complaint herein in trust for the plaintiff, and that plaintiff's title thereto be forever quieted as against the said defendants and each of them, or, if it be deemed that such relief is not grantable, that the cause be remanded for new trial.

A. H. KENYON,
S. M. STOCKSLAGER,
Attorneys for Plaintiff.

Endorsed, Filed Nov. 14, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 660.
PRAECIPE

An appeal having been prosecuted by the plaintiff above named from the final decree entered herein, dismissing the bill of complaint of the plaintiff.

IT IS NOW STIPULATED, by and between the parties hereto by their respective solicitors, that the following papers shall, together with the petition for appeal, order allowing appeal, bond on appeal, citation on appeal, be incorporated into and constitute the record on such appeal:

1. Copy of amended Bill of Complaint.

2. Copy of Answer of defendant, Northern Pacific Railway Company to amended bill of complaint.

3. Copy of Answer of defendant, Edward Rutledge Timber Company, to amended bill of complaint.

4. The abstract of the evidence.

5. A copy of final decree.

6. A copy of the opinion of the trial court.

It is further stipulated that such transcript, including the foregoing papers, may be approved by the Judge of said Court for the purposes of the appeal herein.

A. H. KENYON,
S. M. STOCKSLAGER,
Counsel for Plaintiff.

STILES W. BURR and
HORACE H. GLENN,
SKUSE & MORRILL,
Counsel for Defendant,
Northern Pacific Railway Co.

CHAS. W. BUNN,
CANNON & FERRIS,
Counsel for Defendant,
Edward Rutledge Timber Co.

Endorsed, Filed Nov. 14, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

CITATION ON APPEAL

UNITED STATES OF AMERICA,—ss.

To Edward Rutledge Timber Company, a corporation, and Northern Pacific Railway Company, a corporation:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within Thirty (30) days from the date hereof pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Idaho, wherein, Alra G. Farrell (substituted for Beldon M. Delany), is the appellant and Edward Rutledge Timber Company, a corporation, and Northern Pacific Railway Company, a corporation, are appellees, to show cause, if any there be, why the said decree in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties on that behalf.

WITNESS, the Honorable Frank S. Dietrich, Judge of the United States District Court for the District of Idaho, this 23rd day of November, 1918, and of the Independence of the United States the One Hundred and Forty-second.

(SEAL)

FRANK S. DIETRICH,
District Judge.

ATTEST:

W. D. McReynolds, Clerk.

Service of the foregoing Citation on Appeal acknowledged and copy thereof received this 29th day of November, 1918.

STILES W. BURR &
HORACE H. GLENN,
Counsel for Defendant,
Edward Rutledge Timber Company.

CANNON & FERRIS,
CHARLES DONNELLY,
Counsel for Defendant,
Northern Pacific Railway Company.

RETURN TO RECORD

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

ATTEST:

W. D. McREYNOLDS,
Clerk.

(SEAL)

(Title of Court and Cause.)

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 154, inclusive, to be full, true and

correct copies of the pleadings and proceedings in the above entitled matter, and that the same together constitute the transcript upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe for such transcript.

I further certify that the cost of the record herein amounts to the sum of $216.95, and that the same has been paid by the appellant.

I further certify that I have received from the appellant the sum of $200.00 cash bond on appeal; which amount is deposited in the registry fund of this Court pending the termination of this appeal.

Witness my hand and the seal of said Court this 21st day of December, 1918.

W. D. McREYNOLDS,

(SEAL) Clerk.

No. 3276

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

ALRA G. FARRELL, SUBSTITUTED FOR BELDON M. DELANY,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Appellees.

OPENING BRIEF OF APPELLANT.

No. 3276

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

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Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

ALRA G. FARRELL, SUBSTITUTED FOR BELDON M. DELANY,

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EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Appellees.

OPENING BRIEF OF APPELLANT.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

A. H. KENYON,
Spokane, Washington,
S. M. STOCKSLAGER,
Washington, D. C.,
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CHAS. W. BUNN,
CHARLES DONNELLY,
St. Paul, Minnesota,

CANNON & FERRIS,
Spokane, Washington,
Attorneys for Northern Pacific Railway Co.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

ALRA G. FARRELL, SUBSTITUTED FOR BELDON M. DELANY,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Appellees.

OPENING BRIEF OF APPELLANT.

STATEMENT.

Beldon M. Delany, as plaintiff, began this action seeking to have the defendant Edward Rutledge Timber Company declared to be a trustee for him of the legal title to a certain quarter section of land hereinafter described, of which title Delany claimed to be the equitable owner by virtue of settlement and subsequent entry and final proof made under the homestead laws of the United States.

The facts involved in the consideration of the questions raised on this appeal as shown by the pleadings, established on the trial and found by the trial court, are as follows:

Under date of July 5, 1901, the Governor of the State of Idaho applied to the Surveyor General of the State of Idaho and the Commissioner of the General Land Office, for a survey of certain townships of unsurveyed lands, including the land in question, under the act of August 18, 1894, which application was filed in the Office of the Commissioner of the General Land Office on July 15, 1901; thereafter the State complied with the requirements of this act and actually obtained title to some of the lands covered by this application, but no part of the lands involved in this action.

The defendant, Northern Pacific Railway Company, attempted to select this land under the act of March 2, 1899, and claims to have filed its lieu selection list No. 71 in the Local Land Office at Coeur d'Alene, Idaho, on July 23, 1901.

On or about May 1st, 1902, one W. B. Leach, a citizen of the United States over the age of twenty-one years and qualified to make homestead entry, having no knowledge of the application of the State or of the filing of the lieu selection list above referred to by the Northern Pacific Railway Company, settled upon a portion of the vacant unoccupied public domain of the United States, which was afterwards, by the official survey of

the United States, found to be the Northeast Quarter of Section 20, Township 43, North Range 4, E. B. M., and continuously resided and made his home thereon until June 21, 1903, when Beldon M. Delany, also a citizen of the United States, competent to acquire lands under the homestead laws, purchased the improvements of W. B. Leach and made settlement of this land, established his home thereon, with the intention of entering the same under the homestead laws of the United States when open for entry, and further improved and cultivated the land and continuously resided and made his home thereon until the time of his death, which was subsequent to the commencement of this action. This action was commenced in July, 1916.

The land was surveyed and opened to settlement on June 4, 1909. Delany made application to enter the lands under the homestead laws on June 10, 1909, and on or about November 20, 1912, offered final proof, having made his home upon said land, cultivated and improved the same for more than ten years at that time.

In fact, all went merry as a marriage bell till Delany attempted to make homestead entry, then his application to enter was rejected "for the

reason that the same is all in conflict with the selection by the State of Idaho," as stated in the notice of rejection given Delany by the Register of the Local Land Office on August 24, 1909. (See R., p. 115.)

From this decision rejecting his homestead application, Delany appealed to the Commissioner of the General Land Office and on December 16, 1909, the Commissioner of the General Land Office sustained the decision of the Local Land Office, saying in part:

> "It appears, however, that said T. 43, N. R. 4 E. with a number of others was withdrawn from settlement or other appropriation adverse to the State, under date of July 5, 1901, upon application of the Governor of Idaho, under the act of August 18, 1894 (28 Stats. 394). The language of the statute is in part as follows:
>
> 'And the lands that may be found to fall in the limits of such townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office.'
>
> Unless therefore, it could be shown that you

were a settler on said N.E.¼ of Sec. 20, prior to the date of the application for the withdrawal by the Governor, the State's right to said tract, under its indemnity selection, is superior to yours, and since it appears that at the date of your application, said tract was covered by the State's list, your application was properly rejected by the local officers.

Very respectfully,

Fred Dennett, Commissioner."

This matter was thereafter re-opened and such proceedings had, that on June 28th, 1915, the claims of the State of Idaho were cancelled and rejected, and thereafter and on July 9, 1915, the homestead application of Delany was held for rejection on the ground that it was in conflict with the selections of the Northern Pacific Railway Company. (See R., p. 118.) From this decision of the Commissioner of the General Land Office, Delany appealed to the Secretary of the Interior, and on November 18, 1915, the Secretary affirmed the decision of the General Land Office upon the ground that the Northern Pacific Railway Company had the right to make a valid application for these lands, notwithstanding the claim of the State of Idaho, and that the claim of the Railway Company might be made subject to the preferred right of appropriation in the State. (See R., p. 119.)

Patent was issued to the Northern Pacific Railway Company, and the Railway Company thereafter conveyed to the defendant Edward Rutledge Timber Company, who now holds the legal title.

Subsequent to the commencement of this action Beldon M. Delany, the original plaintiff, died, and Alra G. Farrell, his sister, was substituted as plaintiff, Alra G. Farrell having succeeded to all of the rights of the said Beldon M. Delany in the lands in controversy.

It further appeared on the trial of the cause, that in July, 1901, the time when the Northern Pacific Railway Company attempted to select this land under the act of March 2, 1899, by filing its lieu selection list No. 71 in the Local Land Office at Coeur d'Alene City, Idaho, that these lands were vacant, unappropriated, unoccupied and unsurveyed public lands of the United States.

That on May 1st, 1902, when W. B. Leach made his first settlement upon these lands, the lands were then a portion of the vacant, unoccupied and unsurveyed public domain of the United States. That when Leach made settlement he immediately built a cabin and took possession of the land, blazed a line around his claim to locate his boundaries and posted notices on each corner; that when

Beldon M. Delany bought out Leach in June, 1903, he took down Leach's notices and posted notices of his own, and that at that time there was no evidence upon the ground that any other person or corporation whomsoever was making any claim to the said land or any part thereof, and the said Delany did not know that any attempt had been made to appropriate the land either on the part of the State of Idaho or the Northern Pacific Railway Company, nor was there anything upon the said land or in the Land Office at Coeur d'Alene, Idaho, to indicate that any such claim was made, save and except that the lieu selection list of the Northern Pacific Railway Company, above referred to, was on file, and the application of the State of Idaho was likewise a matter of record in said General Land Office, but, there was no record, tract book or index by which this fact could be ascertained by the inquiring public, or by the said W. B. Leach, Beldon M. Delany or either of them, because of the fact that no survey of the said land had theretofore been made.

That on said 21st day of June, 1903, the date when the said Beldon M. Delany first purchased the rights of the said W. B. Leach and made settlement upon the land, the nearest surveyed line to

the said lands was the East line of Township 43, Range 2, E. B. M., being 7½ miles distant from the nearest part of the said Northeast Quarter of Section 20, T. 43, N. R. 4, E. B. M., and the land and country between these two lines was very rough and mountainous, and most of it covered with heavy timber.

It will be necessary to quote more fully and in detail from the evidence in connection with the argument, but this brief outline we believe will be sufficient for present purposes.

ARGUMENT.

I.

The attempts on the part of the Northern Pacific Railway Company to select this land under the Act of March 2, 1899, by filing its lieu selection list No. 71 in the United States Land Office at Coeur d'Alene, Idaho, in which it merely described the land as, "*The following tract which when surveyed will be described as follows:* All of 20,-43-4, containing 640 acres," was not a compliance with the requirements of the Act of March 2, 1899, and conferred no right upon the Railway Company as against either the State of Idaho or the plaintiff in this cause.

This being a grant by the Government to a private corporation of certain rights upon the public domain of the United States, it follows that the terms must be strictly construed with before any rights will be acquired by the grantee. This rule is too familiar to require citation of authority.

Sections 3 and 4 of the Act of March 2, 1899, are as follows:

> "Sec. 3. That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said Company, whether surveyed or unsurveyed, which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States; Provided, that any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and

conditions as are provided by law for forest reserves and national parks.

Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the Company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

By Section 4 it is seen that, "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the Company at the local land office shall describe such tract *in such manner as to designate the same with a reasonable degree of certainty.*"

The object and purpose evidently of the act is to require the Company, in any attempt to select unsurveyed lands, to give notice of its selection to the public, bearing in mind that settlers had a right to go upon the unsurveyed public domain and acquire a priority of right of entry by such settlement, and that the law in force at the time of the passage of the Act of March 2, 1899, required these settlers to mark any lands so selected by them plainly upon the ground so as to give physical notice of their claim.

What, then, is a "reasonable degree of certainty" within the meaning of the act in question, must be determined by a proper consideration of the facts above stated. The rights of the settler to go upon the land and make settlement should be borne in mind and the notice required should be such as to protect him to a "reasonable degree of certainty." In this connection the Court will take judicial notice of the fact that prior to the official survey by the United States of its public domain, there is no place in any Land Office for the making of any record concerning "land which when surveyed will be Section 20," etc. We mean by that, that there is not even a book in the office in which such a record could be entered so that it would

be indexed and available as information to the inquiring public. Everybody knew that the lands in controversy were located near Marble Creek, and upon a certain branch of, or at a certain point upon the creek, but no one knew, or could they have ascertained by any reasonable means, that the lands in controversy were at the time of the settlement of Delany and at the time of the filing of lieu selection list No. 71 by the Northern Pacific Railway Company, "lands which when surveyed will be Section 20," etc.

These questions were presented to this Court in case of Andrew West vs. Edward Rutledge Timber Company, reported in 221 Federal, page 30. In the West case the land in controversy was situated three and one-half miles from the nearest surveyed line. In the decision in the West case this Court said:

> "Now, if we move away a step farther from the established survey, and describe the tract to be selected as Section 12, Township 1 North, it would not be a difficult task to set foot on the land and determine accurately its limitations. There would still be a reference back, or a tying back, to Section 36, Township 1 North. But the farther the removal from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, *until eventually no reasonable being could*

expect another to tie back to a known survey for the purpose of identification.''

In the case at bar the removal from an "established survey" is 7½ miles over a rough, mountainous country covered by timber, and we submit that in this instance "no reasonable being could expect another (Delany) to tie back to a known survey for the purpose of identification." Under the circumstances, if Delany had employed an experienced and skilled surveyor to survey these lines, he would have had no assurance that he was located upon what might later be established by the official Government survey as the N.E.¼ of Section 20; for under the existing conditions, it is highly improbable that any two surveys would have established common lines, and what lands would have been designated as the N.E.¼ of Section 20 by the Government survey could not by that means have been determined because the Government survey might have located the Northeast Quarter of Section 20, eight miles east of the then established line instead of 7½ miles.

In the phrase, "with a reasonable degree of certainty," "certainty" means "free from doubt." In view of the fact that Government surveys are in fact in a large percentage of cases found to be

very inaccurate, there must be great doubt and uncertainty in any attempt to anticipate the lines of the official survey.

Again the description and notice was not to be given to an expert surveyor but to the prospective settler—seldom skilled in this line and often with no knowledge of the profession.

For these and other reasons which are quite apparent, we submit that the description used was unreasonable under the circumstances and amounted to no description.

What is reasonable, the facts being admitted, in a question of law, hence the Land Department has, by an error of law, awarded the lands in suit to the defendant when Delany was clearly entitled to them.

To the point that this is purely a question of law, we cite the following analagous decisions:

> "Whether the regulation of a Railroad Company, separating white and colored people and providing separate cars for each race was a reasonable one or not the facts being admitted, is a question of law for the Court."
>
> *Chilton vs. St. L. & Iron Mt. R. Co.*, 19 L. R. A., 269.

"A police regulation must not extend beyond

that reasonable interference which tends to preserve and promote enjoyment generally of those inalienable rights with which all men are endowed, etc.," * * * "and that whether an act purporting to be within the field of the police power is reasonable or not, in the ultimate, is a judicial question."

Bonnett vs. Vallier, 116 N. W. 885, 17 L. R. A. (N. S.) 486-491;

State vs. Redmon, 114 N. W. 137, 14 L. R. A. (N. S.) 229.

"What is a reasonable time to object to items of an account rendered, the dates being clear, is a question of law."

Fleischner vs. Kubli, 25 Pac. 1089;

Standard Oil Co. vs. Van Etten, 107 U. S. 333-334, 27 Law Ed. 322.

"The construction of a written contract where no extrinsic evidence is necessary to explain its terms and also of an oral contract where its terms are admitted is a question of law for the Court."

9 *Cyc.* 591;

38 Wash. 439.

II.

THE DEFENDANT RAILWAY COMPANY COULD ACQUIRE NO VALID RIGHT TO THE LAND BY REASON OF ITS ATTEMPTED LIEU SELECTION, BECAUSE OF THE FACT THAT PRIOR TO THE TIME OF SUCH ATTEMPTED SELECTION, THE STATE OF IDAHO HAD MADE ITS APPLICATION TO SELECT THIS LAND UNDER THE ACT OF AUGUST 18, 1894.

On July 15, 1901, the Governor of the State of Idaho made application for survey under the Act of August 18, 1894.

On July 23, 1901, the Northern Pacific Railway Company filed lieu selection list No. 71 under the Act of March 2, 1899.

On or about May 1st, 1902, W. B. Leach settled on this land.

On June 21, 1903, Delany settled on this land in suit.

On June 4, 1909, official survey was made and filed in the Local Land Office.

On June 10, 1909, Delany made homestead entry.

The record in this case shows that Delany's homestead application was rejected by the Local Land Office on August 31, 1909, for the reason, "that the same is all in conflict with the selection by the State of Idaho." (Record, p. 115.) Delany appealed from the decision of the Local Land Office, and on December 16, 1909, the Commissioner of the General Land Office affirmed the decision of the Local Land Office, saying in part:

> "It appears, however, that said T. 43, N. R. 4, E., with a number of others was withdrawn from settlement or other appropriation adverse to the State, under date of July 5, 1901, upon application of the Governor of Idaho, under the act of August 18, 1894 (28 Stats. 394). The language of the statute is in part as follows:
>
> 'And the lands that may be found to fall in the limits of such townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise, except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office.'
>
> Unless, therefore, it could be shown that you were a settler on said N.E.¼ of Sec. 20, prior to the date of the application for the withdrawal by the Governor, the State's right

to said tract, under its indemnity selection, is superior to yours, and since it appears that at the date of your application, said tract was covered by the State's list, your application was properly rejected by the local officers.

Very respectfully,

Fred Dennett, Commissioner."

On March 20, 1911, First Assistant Secretary of the Interior in reviewing the law of this case, and having under consideration the identical question above referred to, said:

"'A sufficient answer to this contention is that for the purposes of this case it is immaterial that the Commissioner of the General Land Office refused to "withdraw" these lands. By the terms of the act of August 18, 1894, *supra,* under which the application for survey was made, the withdrawal became effective and was an accomplished fact upon the perfection of the application and while it remained for the Commissioner of the General Land Office to give notice of the withdrawal, the failure of that officer to do so did not defeat it. The withdrawal was statutory and in nowise depended on the discretion of the Commissioner of the General Land Office (Thorpe *et al.* v. State of Idaho, 35 L. D. 640). This being true, and *the lands being withdrawn for a special purpose, they were not subject to selection by the railway company,* and this is true without regard to the question whether the State had previously apparently selected an excess of land to satisfy its grants.'

* * * * * *

This office considered the company's selections as invalid when made because the lands applied for were withdrawn for the State under the act of August 18, 1894, supra, that the departmental decision on review was determinative of the company's claim to the lands in question and that the fact of the applications to select presented by the State being in excess of the area required to satisfy its grants in no manner cured the invalidity of such selections.

Under this view of the matter, I am of the opinion the order of suspension of November 20, 1908, should be revoked, the company's selections canceled, and the case closed as to the company.

* * * * * *

It is urged on behalf of the company, in substance: * * * * (2) That, admitting for the sake of the argument, though not conceding, that the State by its application for survey secured a preference right to select said lands in accordance with the provisions of the act of 1894, yet, if the State's selections failed for any cause other than defective application for survey, under well settled rulings, of the land department, the company's right would attach as of the date of its selections, and that it would be entitled to priority over claims of any character subsequently initiated.

The prior adjudications in this case have proceeded upon the assumption that the State's application for survey of these townships was regularly filed, and that there was due compliance on its part with every essential requirement of law, the questions heretofore raised going to alleged failure of the commissioner of the General Land Office to 'with-

draw' the land upon such sufficient application and the question of legality of a withdrawal of lands admittedly largely in excess of the State's grant for all purposes. The questions so considered were decided in favor of the State and those questions will not be reopened.

The law necessarily contemplated a withdrawal or reservation of more lands than were necessary to satisfy the State's grants, and the failure of the Commissioner of the General Land Office to issue an order of withdrawal in further assurance of the legislative intention, could not jeopardize such right as was accorded the State by said act. * * * *

There thus remains only the further contention that when the State's selections failed the rights of the company attached as of the date of presentation of its lists. There is something in this argument but not so much as is claimed for it. It has never been held by this Department in a case where the State made its selections under the act of 1894 and in attempted exercise of its preference right, that upon the rejection of such selections intervening adverse claims for the same lands would be recognized as of the date proffered. *Specifically, it has surely never been held that proffered selections by a railway company, under any law, for lands covered by a valid application for survey under the act of 1894, secured any legal rights whatever.* This act provides that such lands shall be 'reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the

date of the filing of the township plat of survey in the proper district land office.'

Now, at the date these railway lists were filed these lands *were reserved from appropriation adverse to the State.* No legal rights could, therefore, have attached under such filing. The State afterwards selected the land and thereafter the question of its right thereto was one between it and the government, and that question was not complicated by the filing of intervening adverse claims, even though same were filed pursuant to and received in accordance with subsisting administrative policy. The contention made involves the consequence that in instances where, after the State's application for the survey of the township under the act of 1894, shall have been defeated by placing the lands in a national forest, still the railway claim would not be defeated by the creation of such national forest, and, therefore, by indirection, the superior claim of the State would be defeated by the inferior one of the company. Such a consequence would be wholly unfair, was not contemplated, and can not be tolerated.

If, as matter of administration, and for the preservation of equities, the land department should determine to recognize priority in the initiation of these claims, inasmuch, as it has permitted the filing thereof while the lands were so reserved for a special purpose, upon the failure of such purpose it is believed this could legally be done, but while not fully advised of the situation with such minuteness as is desirable, enough of it is known to justify the conclusion that some of this land is covered by the claims of settlers and such claims, in-

itiated as they probably were, in the belief that the State's preference right might not be asserted or might for other reason fail as to the lands settled upon, are, under uniform rulings of the land department and the courts, entitled to the first consideration.

In the adjustment of the equities of settler-claimants, the question of good faith in the initiation and maintenance of such claims is of primary importance. The company's said lists Nos. 133 and 135, embrace selections of unsurveyed lands, and it having been determined under the circumstances of this case that such selections initiated no legal right, it follows that the filing thereof was not the assertion of such claim as would prevent a settler from acquiring equities which it is the purpose of this adjustment to protect. But after the filing of the townships plats of surveys and on *July 31, 1905,* which was within the time allowed by law, the company filed its additional list adjusting these selections to the lines of the public surveys. *These additional filings gave precision to the company's claim and such notice thereof to the public as would prevent the initiation of rights by settlement thereafter upon the lands so selected. This being true, in the consideration of settlement claims your office will reject such as are based upon settlement made subsequently to July 31, 1905. As to such settlement as may have been begun prior to that date, if made in good faith by a qualified homesteader, and since maintained in accordance with law, priority will be accorded, and upon the allowance of entry for the lands so settled upon the company's selection will to that extent stand rejected.*

> If entries of any sort have been inadvertently or mistakenly allowed for any of these lands, they will rest on the same basis as settlement claims, and if they do not fall within the rule above laid down for the adjustment of such claims, they will be canceled. After the adjustment of these claims clear lists of the company's said selections will be forwarded for the approval of the Secretary of the Interior unless objection arises not herein considered." (The italics are ours.)
>
> *N. P. Ry. Company vs. State of Idaho, et al.*, 39 L. D. 583.

Thus we see that from June, 1903, to March, 1911, or during the first eight years of Delany's settlement and homestead entry, his contest was with the State of Idaho, with the State winning at every turn. That is, during this period the claim of the State was upheld by the Land Department as superior to that of the settler. The claim of the Railway Company received little attention, and we see that whenever the Land Department considered the claim of the Railway Company it was flatly rejected, apparently being considered worthy of but little attention.

But later on and on June 28, 1915, the State of Idaho having satisfied its entire grant, its application of July 5, 1901, was rejected and dismissed, and the contest then became one between Delany

and the Railway Company, and on July 9, 1915, Delany's homestead application was held for rejection on the ground that it conflicted with the selection of the Northern Pacific Railway Company.

It is very interesting to note that this decision of July 9, 1915, by the Assistant Commissioner of the General Land Office rejecting Delany's homestead entry and sustaining the selection of the Northern Pacific Railway Company is based upon Delany's letter of appeal dated November 15, 1909, which appeal was decided by the Commissioner of the General Land Office on this same letter of appeal, on December 16, 1909.

On December 16, 1909, the Commissioner of the General Land Office in disposing of Delany's letter of appeal, held that the appeal should be dismissed, because the State's right to the tract was superior to that of Delany's. (See Record, p. 115.)

On July 9, 1915, the Assistant Commissioner of the General Land Office again deciding Delany's appeal based on his letter of appeal dated November 15, 1909, without any motion for re-hearing made on the part of Delany, and without any notice to Delany of such action, and in total disregard of the former decision on this appeal, dismissed his application upon the ground that it was in con-

flict with the selection of the Northern Pacific Railway Company.

Under the decisions of the Land Department effecting the land involved in this controversy from a time prior to the time the Northern Pacific Railway Company attempted to initiate any claim to these lands, to July 9, 1915, these lands were *"Reserved from any adverse appropriation by settlement or otherwise,"* in accordance with the exact language of the Act of August 18, 1894, Section 1 of which said Act being as follows:

> "That it shall be lawful for the Governors of the states of Washington, Idaho, Montana, North Dakota, South Dakota and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships of public lands then remaining unsurveyed in any of the several surveying districts, with a view to satisfying the public land grants made by the several Acts admitting the said states into the Union, to the extent of the full quantity of land called for thereby; and upon the application of said governors, the Commissioner of the General Land Office shall proceed to immediately notify the Surveyor General of the application made by the Governor of any of said states for the withdrawal of said land, and the Surveyor General shall proceed to have the survey or surveys so applied for made, as in the case of survey of public lands; and the lands that may be found to fall within the limits of such township or townships as ascer-

tained by the survey, shall be *reserved upon the filing of application for survey from any adverse appropriation by settlement or otherwise,* excepting as to those rights that may be found to exist of prior inception for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of township plat of survey," etc.

Act of August 18, 1894, Federal Statutes Annotated, Vol. 6, page 374.

Hence the Railway Company could acquire no rights by the filing of its lieu selection list on July 21, 1901.

But in addition to the provisions of the Act of August 18, 1894, the Act of March 2, 1899, under which the Railway Company makes its claim, provides that the Company may select only *"Public lands * * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection."* Act of March 2, 1899, Sec. 3.

This language has been construed many times by the courts and at the time of the settlement of Delany, at the time of the filing of lieu selection list No. 71 by the Northern Pacific Railway Company, and at the time of filing its application by the State of Idaho under the Act of August 18,

1894, the rule of decision in all of the Federal Courts applicable to the case at bar, was that the Northern Pacific Railway Company by its attempted selection acquired no right whatever, and that the prior and superior right to the land under the facts shown, was in Beldon M. Delany.

We ask the Court to consider only a few of them.

The Company was authorized to select only *"Public Land."*

> "By public land is meant such land as is open to sale or other disposition under general laws: land to which any claims or rights of others have attached does not fall within the designation of public land."
>
> *Barden v. Northern Pacific R. Co.*, 145 U. S. 538, 36 L. Ed. 806;
>
> *Northern Pac. R. Co. v. Hinchman*, 53 Fed. 526;
>
> *Northern Pac. R. Co. v. Musser Sauntry Land etc. Co.*, 68 Fed. 1000;
>
> *U. S. v. Oregon, etc. R. R. Co.*, 69 Fed. 901;
>
> *Southern Pacific Ry. Co. v. Brown*, 75 Fed. 90.

Again, the Act of March 2nd, 1899, provides that the Railway Company may select only lands which

are *"Not Reserved."* These lands were reserved according to the decisions of the Land Department, and also by the express provisions of the Act of August 18, 1894, as we have already seen.

Again—The Railway Company could only select lands *"To which no adverse right or claim shall have attached or have been initiated at the time of making such selection."*

> "It is not the *validity of any claim, but the fact that such claim was made,* that excludes the land from the category of public lands within the meaning of the act in suit granting the right to select public lands."
>
> *S. P. Ry. Co. v. Brown,* 75 Fed. 90;
>
> *McIntyre v. Roeschlaub,* 37 Fed. Rep. 556.

If the lands were excepted from the lands which the Company were authorized to select as lieu lands *at the time of the attempted selection,* subsequent abandonment by the State restored the lands to the public domain, but no rights passed to the Railroad Company.

> *Kansas Pac. Ry. Co. v. Dummeyer,* 113 U. S. 629, 28 L. Ed. 1125;
>
> *Hastings and Dakota R. Co. vs. Whitney,* 132 U. S. 357, 33 L. Ed. 363.

The foregoing authorities hold in principle, that

the application of the State of Idaho, reserved the land. That this application of the State was the initiation of a claim within the meaning of the Act of March 2, 1899, and for that reason the land was not open to selection by the Railway Company. Hence it must appear that the Land Department in deciding in favor of the defendant Railway Company, erred as a matter of law. But if there could be any doubt about the matter it has been settled by the Supreme Court of the United States in St. Paul, M. & M. Ry. Company vs. Donahue, 210 U. S. 35, 52 L. Ed. 948-9, wherein the Court construes language identical with that of the Act of March 2, 1899.

In the Donohue case the Court said:

> "But the assumptions upon which these conclusions were based clearly disregarded the fact of the long possession by Hickey and his heir of the land during the pendency of the contest, and disregarded the previous and final ruling of the Secretary, made in February, 1903, which maintained the validity of the settlement of Hickey, and decided that, by such settlement, he had validly initiated a claim to the land. When this is borne in mind it is clear that the ruling rejecting the Donohue claim and maintaining the selection of the railway company was erroneous as a matter of law, since, by the terms of the Act of August 5, 1892 (27 Stat. at L. 390, chap. 382), the

railway company was confined in its selection of indemnity lands to land nonmineral, and not reserved, 'and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection.—' When the selection and supplementary selection of the railway company was made, the land was segregated from the public domain, and was not subject to entry by the railroad company. Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. Ed. 363, 10 Sup. Ct. Rep. 112; Whitney v. Taylor, 158 U. S. 85, 39 L. Ed. 906, 15 Sup. Ct. Rep. 796; Oregon & C. R. Co. v. United States, 190 U. S. 186, 47 L. Ed. 1012, 23 Sup. Ct. Rep. 673."

St. Paul, M. & M. R. Co. v. Donohue, 210 U. S. 35; 52 L. Ed. 949.

But there is another theory under which the plaintiff is entitled to recover in this case. It has been repeatedly decided by the Federal Courts, including the United States Supreme Court, that patents issued by the Land Department for lands which have been previously, granted, reserved from sale, or otherwise appropriated, are void. The reason being that the executive officers of the Land Department are without authority to act in the matter under the law invoked by the party seeking the patent in such case. Unless the lands for which patent is asked are within the class designated in the statute invoked as authority for the issuance of the patent the Land Department

is without jurisdiction to act in the matter. For this reason it may even be shown in an action at law that the patent is void.

Morton vs. Nebraska, 88 U. S. 660, 22 L. Ed. 639;

Hannibal & St. Joe Ry. Co. vs. Smith, 76 U. S. 83, 19 L. Ed. 599;

Burlington & Missouri River Ry. vs. Freemont County, Iowa, 70 U. S. 567, 19 L. Ed. 563;

Lake Superior Ship Canal R. & I. Co. vs. Cunningham, 155 U. S. 354, 39 L. Ed. 183;

Wright v. Roseberry,121 U.S.520-521 B 30 Law.Ed.1048.
Smelting Co.v.Kemp,104 U.S.641 B 26 Law.Ed.876.

M. & O. d. 175;

. 88; 15

16 L. Ed.

If the patent to the lands in suit is void for want of jurisdiction on the part of the Land Department as held by the foregoing authorities, then the plaintiff is entitled to the relief prayed for. In any event the plaintiff has shown that the Land Department committed an error of law upon the state of facts shown in the record here. In order that the lieu selection of the defendant

Northern Pacific Railway Company could attach to these lands upon the cancellation of the claim of the State of Idaho, and become a prior and superior claim to the claim of Beldon M. Delany, who was then a settler upon the lands, or in other words, that the lieu selection of the defendant Railway Company might take effect as of the date of the cancellation of the claim of the State of Idaho, all of the conditions must have then existed which were necessary to enable it to make an original valid lieu selection as of that date, and this the Company could not do for the reason that the record shows that Beldon M. Delany was then a settler upon the land.

In other words, when the claim of the State of Idaho was cancelled on June 28, 1915, Delany was then in possession of the land, residing thereon and had duly made his application to enter the same under the homestead laws of the United States, and the lands were not "vacant and unoccupied," and "lands to which no adverse right or claim had attached or been initiated," at the time of the cancellation of the State's right, and hence were not subject to selection by the Railway Company.

Thus we see that for over twelve years Delany maintained his actual settlement upon the land and his right to the land, under and pursuant to the then current decisions of the Land Office. That is, if the law had continued to be construed and interpreted the same as it was construed and interpreted by the Land Department during the twelve years of Delany's settlement, then the lands in suit would have been awarded to Delany, and yet the respondents now ask the Court to say that the claim of the State of Idaho, which was maintained for a period of over fourteen years, during which time it was sustained by the decisions of the Land Department, and under which the State of Idaho was actually awarded lands in settlement of its claim, was not in fact the initiation of any claim at all, not even an invalid claim.

The trial Court evades a decision of the question of whether or not under the language of the Act of August 18, 1894, these lands were, upon the filing of the application of the State reserved from any adverse appropriation by settlement or otherwise by stating:

> "As already stated, the application was for the survey of eighteen townships, or approximately 403,000 acres, and other applications of a similar character were pending. Taking

cognizance of the vast area thus applied for, and of the limited right of selection remaining in the State, the Commissioner, on July 19, 1901, considered the application in question to be excessive, and declined to recognize it. No appeal having been taken by the State from his ruling, the same became final and binding, provided, of course, that the Commissioner was acting within his jurisdiction. The application having been declined, no notice of its filing was given to the district Land Office, and no notation was ever made upon the township plats in that office or upon any of its records, of the reservation or withdrawal of the land." * * * *

"Upon the question of the power of the Commissioner to reject an application for survey, the act of 1894 is equivocal, and the rulings of the Land Department have not been entirely uniform, the later decisions, however, being in support of such jurisdiction. N. P. R. R. Co. v. Idaho, 39 L. D. 583. Thorpe v. Idaho, 43 L. D. 168. State v. Robertson, 44 L. D. 448. (Also the decision herein involved.)

The language of the act, it is thought, is more readily susceptible to the construction adopted in the first decision, but in practical administration such a meaning gives rise to the most serious difficulties. In that view, a state with an unsatisfied grant of a thousand acres could, by the very simple and inexpensive process of filing an application in the General Land Office and publishing a notice for thirty days, withdraw from entry the entire area of public land, however great, within the State. Is it possible that Congress contemplated or intended such a result? By the

terms of the act, the application for survey must be made only 'with a view to satisfying the public land grants * * * * to the extent of the full quantity of land called for' by the granting acts. Is not the right, therefore, to be regarded as commensurate with the needs of the state? I am not suggesting that the amount applied for cannot in any case properly exceed the unsatisfied grant. The application must be for an entire township, whereas a smaller amount might be sufficient to satisfy the grant. But giving consideration to the extent of the grant and the character of the lands, and the interest of the Government in having its public lands disposed of and not needlessly withdrawn from entry, it is thought that the area to be surveyed must bear some reasonable relation to the area the state has the right to select. Such being the extent of the right or privilege conferred upon the state, it follows that an application for an excessive survey, being unauthorized, is ineffective, and it is for the officers of the Land Department, charged, as they are, with the sale and disposition of public lands, to determine whether in any given case the application is within the law. In any other view I am unable to see how the interest of the Government can be protected. If therefore in fact the application under consideration was found to be excessive, the Commissioner of the General Land Office did not exceed his jurisdiction in declining to recognize it, and in refusing to take any steps to carry it into effect," etc.

Here the trial court is seeking to evade the plain language of the Act, which said:

> "And the lands which may be found to fall within the limits of such township, as ascertained by the survey, *shall be reserved upon the filing of application, for survey from any adverse appropriation by settlement or otherwise,* excepting those rights which may be found to exist of prior inception, for a period to extend from such application for survey to and until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office."

Under the terms of this Act, it is not the Commissioner who reserves the land, but the law makes the reservation, and it becomes effective upon the filing of the application by the Governor, and no notice of any withdrawal is necessary to thus effect the withdrawal of the lands from appropriation or entry.

The Court makes a very adroit argument to the point,

> "that a state with an unsatisfied grant of one thousand acres could, by the very simple and inexpensive process of filing an application * * * * withdraw from entry the entire area of public land, however great, within the state. Is it possible that Congress contemplated or intended such a result?"

> "It is thought that the area to be surveyed must bear some reasonable relation to the area the state has the right to select."

Here the Court has very adroitly substituted the

judgment of the Commissioner of the General Land Office for the judgment of the Governor of the State of Idaho, in whom Congress has reposed the power and authority to determine how many townships shall be reserved for a period of *sixty days* until the State can perfect its selections. We cannot see why the trial Court should find that the vesting of this power in the Governor of the State was such a calamity and was in derogation of the common rights of the public to acquire the public lands of the United States, or wherein greater safety would lie in placing this power in the hands of the Commissioner of the General Land Office. It seems very clear and plain that the Act in question vests this function in the Governors of the several States, who are just as much the representatives of the people and intending settlers as is the Commissioner of the General Land Office, and if their respective merits are to be judged from their acts and the results of their labors, we conclude that Congress used good judgment in selecting the Governors.

The trial Court also eliminates the words "reserved" and "withdrawn" from the Act of March 2, 1899, by following the same route taken by the

Land Department, and in his decision on page 144 of the record says:

> "If, however, we assume that the application was valid, and that the Commissioner was without power to reject it, it must be borne in mind that it constituted no offer to enter the land, but amounted only to a request to have it surveyed. The land was not entered or selected; the State made no specific claim, and it might ultimately decide not to select a single subdivision. True, the terms "reserved" and "withdrawn" are used in the act, but when we consider its intent and purpose, clearly the only effect contemplated was to confer upon the State a preference right to select at its option. By the filing of the application the State initiated no claim or right to any portion of the land. As has been very properly held by the Land Department, I think the position of the State is closely analogous to that of a successful contestant after the cancellation of record of the contested entry. The land embraced in such entry is, as a result of the cancellation, fully restored to the public domain, and is no longer segregated or reserved, but the contestant possesses the preference right of entry. Accordingly, following the practice in relation to such contested entries, the Department holds that the pendency of such preference right does not operate to prevent the filing of other applications, subject to such preference right. Stewart v. Peterson, 28 L. D. 515. Cronan v. West, 34 L. D. 301. State v. N. P. R. R. Co., 37 L. D. 70. Swanson v. N. P. R. R. Co., 37 L. D. 74. Delaney v. N. P. R. R. Co., (unreported, decision Nov. 18, 1915). No good rea-

son is apparent for holding such a practice illegal."

Not one of the decisions of the Land Department cited by the trial Court will be found to be authority for this broad statement if carefully analyzed.

The first case cited is Stewart v. Peterson, 28 L. D. 515. The Land Department in the Stewart case was considering a case in which two private individuals had contested the right to enter a certain tract of land. On the closing of the contest a preference right of entry was accorded the successful contestant for a period of thirty days, and in that case the Department established the rule:

> "That no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been cancelled upon the records of the local office therefor and until the period accorded the successful contestant has expired, or he has waived his preference right. Applications may be thereafter entered and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant, or upon the filing of his waiver of his preference right."

But we fail to see how this rule has any application to the case at bar, because it is a rule established under the law governing the rights of

individuals to enter lands, and hence could have no application to an attempted entry under a statute like the Act of March 2, 1899, which specifically prohibits an entry by the Railway Company under such circumstances, or, in other words, provides that in such cases the Railway Company has no right of entry.

It does not, however, prevent an individual, such as Delany, from acquiring settlement rights upon the land subject to the preference right of the successful contestant to enter within the thirty-day period. But the Stewart case goes farther and cites another rule as follows:

> "1. That no application to make entry will be received by the local officers during the time allowed for appeal from a judgment of cancellation of an entry; but in all such cases the land involved will not be subject to entry or application to enter until the rights of the entryman have been finally determined, until which time no other rights, inchoate or otherwise, can attach."

Under this rule, the application of the Railway Company having been made before the State's application was cancelled by judgment of the Land Department, the Railway Company acquired no rights inchoate or otherwise, but this rule would

not prevent Delany from acquiring settlement right under the Squatters Act.

The same is true of the case of Cronan v. West, 34 L. D. 301, cited by the trial Court. This is a case between individuals.

In the case of State vs. Northern Pacific Railway Co., 27 L. D., page 70, the Land Department says:

> "The objection that the lands were not subject to selection by the company because embraced in the State's application for survey, even if well taken, could not be interposed as to the tracts applied for by Hooper, as the company's selection was made June 21, 1901, and the State's application was not presented until July 8, following. As to Perkins, the objection, if valid, would only be material in so far as it relieved him from the necessity of proving his prior settlement. The application of the State for survey did not, however, operate as an absolute withdrawal of the land described therein, but only subjected such lands to the preferred right of the State to select them within sixty days from the time of the filing of the approved plats of survey."

Thus we see that this statement of the Commissioner is mere *obiter dictum*. There is no discussion of the rule, and a discussion of it in that case was useless because it was wholly immaterial to the case.

The case of Swanson vs. Northern Pacific Railway Company, 37 L. D. 74, decided immediately following the State v. Northern Pacific Railway Company, above cited, is based entirely upon the decision in the case of State vs. Northern Pacific Railway Co., *supra,* and the question here involved was not raised or discussed.

The Court further cites the decision of the Land Department in the case at bar. An examination of this case will show that of all the cases there cited in support of the action of the Department, not one will be found wherein the Land Department has fairly considered the question here under discussion.

Thus the trial Court falls into the error of adopting the rule of decision of the Land Department when that rule of decision is not based upon any ruling made in any cause where the present question was raised, or was necessarily involved. In other words, the rule was made in a cause wherein the question was wholly immaterial.

Thus we believe that we have shown that the Land Department, by an error of law, has taken from the plaintiff's predecessor in interest, Delany, the lands to which he was entitled, and have awarded them to the defendant Railway Company,

which Company subsequently conveyed to the Edward Rutledge Timber Company, and for the reasons here shown the decree of the trial Court should be reversed, and a decree awarded plaintiff as prayed for in her complaint.

Respectfully submitted,

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United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

No. 3276.

ALRA G. FARRELL, (substituted for Belden M. Delany),
APPELLANT,

vs.

EDWARD RUTLEDGE TIMBER COMPANY
and
NORTHERN PACIFIC RAILWAY COMPANY,
APPELLEES.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATEMENT.

This case is almost identical with *West v. Edward Rutledge Timber Company*, 244 U. S. 90, which was before this Court in 221 Fed. 30; although the West case did not involve the question principally relied upon by appellant on this appeal. The present suit was commenced some

time before the decision of the West case, and much of the matter embraced in the original and amended pleadings is addressed to questions which are set at rest by that decision.

The land in controversy was selected by the defendant Railway Company, on July 23, 1901, under the exchange provisions of the act of March 2, 1899, (30 Stat. 993). This was two years prior to the settlement of the original plaintiff, Delany, to whose rights the present plaintiff and appellant claims to have succeeded, and one year prior to the earliest settlement made on the land—that of W. B. Leach, whose cabin and improvements Delany took over in 1903. In the original and amended complaint it is alleged that Leach settled on the land in April, 1901, previous to the Railway Company's selection; but at the trial this allegation was withdrawn and it was admitted that Leach did not go on the land until May, 1902—thus taking out of the case an issue which is made a rather prominent feature of the pleadings.

The land did not come under survey until eight years after the Railway Company's selection. The township plat of survey was filed in the Local Land Office on June 4, 1909; and on the same day the Railway Company duly filed its "re-descriptive list" according to the provisions of the act of March 2, 1899, and the regulations and practice of the Department. The Railway Company's selection, and the procedure thereunder were in all respects identical with that considered in the West case; and its validity, regularity and priority are authoritatively established by that decision, save as to the one special ground of attack which is principally argued on this appeal.

On June 10, 1909, a few days after the filing of the town-

ship plat of survey, and of the Railway Company's "re-descriptive list," Delany tendered an application to enter the land under the homestead law, alleging settlement on July 21, 1903. This application was rejected by the Register and Receiver; and, on successive appeals, by the Commissioner of the General Land Office and the Secretary of the Interior. Petitions thereafter made by Delany for rehearing and for the exercise of the supervisory power of the Secretary were denied. An attempted selection of the land in the name of the State of Idaho will be more particularly mentioned hereafter—for the present it is enough to say that the State's claim was rejected, and the rejection affirmed by the Secretary; and that the State acquiesced in that decision and has made no further claim to the land. Finally, in 1916, the land was patented to the Railway Company; which thereafter conveyed to the defendant Edward Rutledge Timber Company, by warranty deed, in fulfillment of a previous contract. This suit was commenced in July, 1916; and the original plaintiff and homestead claimant, Delany, having died pending the suit, the present appellant, Alra G. Farrell, was substituted as plaintiff, under allegations that she was an heir of Delany and held a conveyance from his other heirs.

In the Court below appellant rested on two propositions; both of which are urged on this appeal. The first of these propositions was that the description of the land contained in the Railway Company's selection list was insufficient, because made in terms of future survey. This question is foreclosed by the decisions of this Court and the Supreme Court in the West case, but appellant seeks to distinguish the cases on the ground that the land here involved was somewhat further from the nearest township

line of survey established at the time of selection than was the land in the West case; arguing that for this reason the rule of the West case does not apply. The second proposition is that the land was placed in reservation by an application for survey under the act of August 18, 1894, 28 Stat. 372, 394, made by the State of Idaho in July, 1901, a few days prior to its selection by the Railway Company; and that the selection was therefore void for all purposes and conferred no rights upon the Railway Company, although such reservation was not a barrier to subsequent settlement under the homestead law. These questions (together with others foreclosed by the decisions in the West case) were expressly presented to and were fully considered and decided, against appellant's present contentions, by the Commissioner of the General Land Office and the Secretary of the Interior, in the face of the same arguments and authorities urged by appellant in the Court below and on this appeal. (Record pages 86-97, 119-125, 133-134; *Daniels v. Northern Pacific Ry. Co.,* 43 L. D. 381; *Thorpe v. State of Idaho,* 43 L. D. 168; *Miles v. Northern Pacific Ry. Co.,* February 16, 1915, unreported.) And these questions were further considered and decided against appellant by the Court below. (Record pages 136-146.)

ARGUMENT.

I.

This is a suit in equity to charge the defendants, as holders of the patent title, with a trust in favor of appellant, on the ground that appellant has the superior right to the land which was disregarded by the officers of the Land Department through error of law (no fraud or mistake being claimed). And under familiar rules it is incumbent upon appellant to show, not merely that it was error to award patent to the Railway Company, but also that the entryman Delany, under whom she claims, had sufficiently complied with the requirements of the homestead law so as to be entitled to patent, as against the Government, if the claim of the Railway Company were out of the way.

Bohall v. Dilla, 114 U. S. 47, 51.
Sparks v. Pierce, 115 U. S. 408, 413.
Lee v. Johnson, 116 U. S. 48, 50.
Smelting Co. v. Kemp, 104 U. S. 636, 640, 647.

It was therefore incumbent upon appellant, in order to put her in position to raise the questions here argued, to show that Delany had fully complied with the requirements of the homestead law with respect to residence, improvement and cultivation. The evidence on these points will be found at pages 59-67 of the record. As to this the Trial Court says (Record pages 137-138):

> "Delany's acts of settlement and residence are far from satisfactory, and I have great hesitancy in holding them sufficient. True, the showing is not radically different from that in the West case, but in that case the amount cleared and cultivated was thought to be 'pathetically small', and, however broad our sympathy for the settler, a line must be drawn somewhere. I am not at all sure that the land officials would have found the showing sufficient had they considered the final proof, but inasmuch as their rejection was upon other grounds, I shall, in the further consideration of the case, assume that the residence and improvements met the requirements, under the liberal policy prevailing in the Land Department, and that the final proofs would have been accepted but for other conditions upon which the land officials acted."

We submit that this is far from an affirmative finding that the homestead law was complied with. And inasmuch as the decree was against appellant and there was no finding or determination in Delany's favor by the Land Department, there can be no presumption in her favor in this Court. Before the Court may properly enter upon a consideration of the questions urged on this appeal, it must determine, in the first instance, that the evidence presented by appellant to the Court below affirmatively shows sufficient compliance with the requirements of the homestead law with respect to residence, improvement and cultivation. And we respectfully submit, without argument, that the proof offered is inadequate to sustain such a finding; or to support the inference that Delany intended, in good faith, to make the land his home rather than to acquire a valuable tract of timber for purposes of speculation.

II.

The only possible ground for distinction between this case and the West case is that in the present case the land involved was, at the time of its selection by the Railway Company, seven miles distant from the nearest established line of survey; whereas in the West case the land was only three miles distant from the nearest surveyed line. Counsel says that the distance was seven and a half miles. But the tract selected by the Railway Company was "all of section 20", and not merely the northeast quarter of that section afterwards claimed by Delany. (Record pages 104, 110.) And section 20 in this township is only seven miles from the east line of township 43, range 2 (Record page 67).

The Trial Court says (Record page 138):

> "The description in the railroad company's selection list was in terms of future survey, as in the West case, and while the distance to the surveyed lands is a little greater, the difference is not such as to warrant a holding that as a matter of law the description was insufficient to designate the land 'with a reasonable degree of certainty.' Within reasonable limits, it is a question of fact in any case whether such a description is sufficiently certain, and a finding thereon by the Land Department within such limits will not be disturbed by the courts."

We do not concede, nor has it been held, that the sufficiency of a description like that here involved may be determined merely by consideration of the case and readiness with which, because of close proximity of established lines of survey, the land may be identified. This is not the view of the Department. Several of the cases cited above

are disposed of on a contrary theory. In *Miles v. Northern Pacific, supra,* it is said:

> "Regarding 'the lack of proximity of established Government surveys' to the lands here involved, it may be stated that, *whilst not an issue* in this case or the Daniels case, the decision in the latter case did discuss the question whether Daniels might not, from existing corners of the Government surveys, have ascertained, without much difficulty, the locus of the land he settled upon in its relation to the public surveys."

But the Secretary continues:

> "If, as appears from the record, the land was subject to selection by the Railway Company, and, prior to the settlers going thereon, the company filed its selection list in the local office—the only notice required by the act of 1899—*any difficulty the settlers might be under in determining the location of the land, due to the lack of Government surveys, could not give them rights paramount to those of the Railway Company.*"

In the decision of this Court in the West case (221 Fed. 30) it was recognized that prior to 1908 the regulations and practice of the Department not merely permitted, but required, selections of unsurveyed lands to describe the selected tract "according to the description by which it will be known when surveyed", without regard to the proximity of established survey lines, and that no other or more particular form of description was required. And it seems to be the plain purport of the decisions of the District Court, this Court and the Supreme Court in the West case that where the Railway Company has pursued the sanctioned and approved practice with respect to description of the selected land, its selection cannot be adjudged invalid upon the ground of alleged inadequacy or

indefiniteness of description, merely because the lack of proximity of established survey lines renders the identification of the land somewhat difficult to a subsequent settler without the aid of an experienced surveyor. In the West case Judge Dietrich said (210 Fed. 189, 197):

> "It is apparent that unless the view be adopted that, as a matter of law, *under no conditions* can a description by reference to the lines of the official survey be held to be in compliance with the act, the question of the sufficiency of the description is in every case one of fact, and hence not subject to review by the Courts; and I am wholly unable to assent to the proposition that such a description can under no circumstances be held to be reasonably certain."

It is true that in the opinion of this Court in the West case it was intimated that under exceptional and extraordinary conditions, which might be imagined, where the land was utterly removed from settled districts or surveyed lands, a description in terms of future survey might be held too indefinite. But that was merely a concession for the purpose of argument and not a declaration by the Court of a controlling principle of law. What this Court said was:

> "It may be conceded, *insofar as it respects this case*, that a description of a section or a quarter section by legal subdivisions in the fastnesses of the Cascades or Rocky Mountain ranges, far distant from any Government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute."

And it was held that, even under this theory, and assuming the question of fact to be open to examination by the Court in that case, description in terms of future survey of land lying three miles distant from an established

surveyed line (although in a rough mountain country) was sufficiently definite and certain, as a matter of law. This is not inconsistent with the view that where the Railway Company has pursued the method prescribed by the Department, and where the Department has expressly held that the description in its selection list was sufficiently definite and certain (as in this case), its title is immune from attack regardless of the relative proximity of established surveys. At most, the question whether a given description is sufficient to "designate the land with a reasonable degree of certainty" as provided in the act of March 2, 1899, is a question of fact; and upon any question of fact the determination of the Department is conclusive, and cannot be inquired into by the Courts. As pointed out by Judge Dietrich, in the language quoted above; "unless the view be adopted that, as a matter of law, *under no condition* can a description by reference to the lines of the official survey be held to be in compliance with the act, the question of the sufficiency of the description is in every case one of fact, and hence not subject to review by the Courts."

And in the West case this Court said:

> "To prevail, the plaintiff must sustain the position that the description contained in the Railway Company's selection list first filed was, as matter of law, insufficient to support the selection, for if it depended on a matter of fact the controversy would be settled by the judgment of the Land Department in rejecting the application of West for homestead entry and approving the selection of the Railway Company. 'It has undoubtedly been affirmed over and over again,' says the Supreme Court, 'that in the administration of the public land system of the United States questions of fact are for the consideration and judgment

of the Land Department, and that its judgment thereon is final.' Burfenning v. Chicago, St. Paul, etc. Ry., 163 U. S. 321, 323."

However, suppose we lay these considerations aside and assume that it is permissible for the Court to re-examine the question for the purpose of determining whether the land in suit was so far distant from established lines of survey that the determination of the Department that the description was sufficiently definite and certain constituted error of law. In the West case the Supreme Court (as well as this Court and the court below) held a similar description sufficient as applied to a tract three miles from the nearest survey line. The land in suit was, at the time of selection, seven miles from the nearest line of survey. That land and this are in adjoining townships, and the physical characteristics of the country are the same. Under such circumstances is it permissible for the Court to hold insufficient a description held good in the West case? For it must be remembered that the question is one of *fact*, depending upon physical and other conditions as to which the Department is peculiarly well informed, and that a determination of *fact* by the Department is conclusive and not subject to review by the Courts.

III.

We pass now to the question which is the real issue in the case. As already stated, appellant's theory is that the land was placed in reservation by an application for survey under the act of August 18, 1894, made by the

State of Idaho in July, 1901, a few days prior to its selection by the Railway Company; and that the selection was therefore void for all purposes and conferred no rights upon the Railway Company, although such reservation was not a barrier to subsequent settlement under the homestead law.

The first question which confronts the Court, therefore, is whether there was a *valid* application for survey under the act of 1894, which became effective *before* selection of the land by the Railway Company on July 23, 1901. If this question can be resolved in appellant's favor, it will then become necessary to determine whether such application for survey resulted in an absolute reservation or withdrawal of the land, so that no rights whatever attached under the Railway Company's selection, notwithstanding the fact that the State thereafter failed to make a valid selection of the land and could not and did not acquire any rights therein.

Both these questions have been determined adversely to appellant's theory by numerous decisions of the Land Department, as well as by the Court below. After some early vacillation, the Department has consistently held, first, that the application for survey with which we are here concerned was invalid and never became effective; and second, that a valid application for survey merely creates a preference right in favor of the State, and that a subsequent selection under an act like that of March 2, 1899, initiates a claim which is effective against all the world unless the State itself thereafter succeeds in appropriating the land under the provisions of its granting act—which it here failed to do. And appellant can prevail only if the Court holds the decisions of the Department

erroneous in law as to *both* these issues. If *either* was correctly decided her case falls.

1.

The facts with respect to the application for survey are somewhat complicated, and there are some inconsistencies in the earlier decisions of the Department which tend to confusion. It is therefore essential to a proper understanding of the case, not only that the facts be attentively considered, but also that the chronological relation of the various steps taken be kept clearly in mind. And we believe that it will conduce to a better understanding of the situation if we preface our outline of the steps taken under the actof 1894 with a brief analysis of the act itself.

This act was passed in aid of land grants previously made by Congress to Idaho and other western states. An important feature of these granting acts was the so-called quantity and indemnity grants, requiring affirmative selection by the States; and this right of selection could only be exercised after survey. Complaint was made that the States were usually worsted in the race to the Land Office, and Congress thereupon passed the act of March 3, 1893, which gave a preference right of selection for sixty days after filing of the township plat of survey. This, however, was said to be insufficient, because it gave no protection against claims attaching before survey under laws permitting selection of unsurveyed lands and the initiation of homestead claims by settlement before survey; and the States demanded legislation under which some preference could be secured against such claims. In response to this demand Congress passed the act of 1894.

In construing that act its object and purpose must, under familiar rules, be kept always in mind. This was no more than to give the States a preference right of selection of designated unsurveyed lands, as against claims initiated after such designation is made. It was no part of the purpose of the act to discourage homestead settlements on unsurveyed lands, nor to limit or destroy the right of appropriation of such unsurveyed lands under other acts. Indeed, the act of March 2, 1899, with which we are here concerned, and the acts of June 4, 1897, and July 1st, 1898, were all passed long after the act of August 18, 1894; and by each of those acts the selection of unsurveyed lands is expressly authorized.

So while it may be that by the literal terms of the act of 1894, the result of a valid application for survey is to "reserve" or "withdraw" the land designated in the application; nevertheless the true construction of the act, as settled by repeated decisions of the Land Department, is that the application for survey does *not* effect a "reservation" or "withdrawal" of the lands, in the sense in which those words are ordinarily used in land law terminology, but merely secures to the State a preference right of selection. The land is not *segregated* by the application for survey (as it is by an ordinary entry or selection) so as to constitute a bar to the initiation of subsequent claims. Any claim thereafter initiated is, of course, subject to the preference right of the state, and will be defeated by a valid selection thereafter made by the State within the preference period. But if the State does not select the particular land, or if an attempted selection by the State is rejected as unauthorized or illegal (as in this case), the

individual claimant is accorded priority over all other claims subsequently asserted. In one case, and one only, a contrary view was expressed. That is the Departmental decision of March 20, 1911 (39 L. D. 583) quoted at length and so much relied upon in appellant's brief. But that case stands alone and unsupported; it is inconsistent with all other prior and subsequent Departmental decisions on the subject; of which there are many; and it has since been expressly overruled and repudiated.

Another thing to be kept in mind in considering the provisions of the act of 1894, and the steps taken under it in the present instance, is the well established rule that the preference or privilege conferred by the act is in derogation of the common right to appropriate public land under other laws; and hence that it must be strictly construed and strict performance required of those steps upon which its operation is conditioned. See authorities hereinafter cited.

Now the terms of the act of 1894 require the following conditions to be performed in order that the State may acquire a preference:

(a) The Governor shall file with *the Commissioner of the General Land Office* a written application for the survey of the designated township or townships.

(b) Published notice of such application, sufficient to "give notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State" for the prescribed period, shall be given by the Governor within thirty days after the date of the *filing of the application.*

(c) Such notice shall be published in a newspaper of general circulation in the vicinity of the lands designated, "which publication *shall be continued for thirty days from the first publication.*"

(d) The Commissioner of the General Land Office shall immediately give notice of the reservation of the designated township, or townships, to the local Land Office in the district in which the land is situated.

(e) The Commissioner shall immediately give notice of the application to the Surveyor General of the State, who shall thereupon cause the required survey to be made.

Notwithstanding some uncertainty in the earlier cases, it is now the settled law of the Department that strict compliance with these provisions is a condition precedent to the attaching of the preference right of the State; and also that the act contemplates, by necessary implication, the recognition and allowance of the application for survey by the Commissioner of the General Land Office, so that in the absence of such recognition and allowance the preference provisions of the act are inoperative.

In July, 1901, the Governor of Idaho undertook to apply under the act of August 18, 1894, for the survey of eighteen townships in northern Idaho, including township 43, range 4, with which we are here concerned. He signed a form of application which bore date July 5th, 1901, and which was addressed *to the Surveyor General for Idaho* and the Commissioner of the General Land Office. This paper was filed, not with the Commissioner of the General Land Office as required by the act of 1894, but in the office of the Surveyor General at Boise. It was so filed, not

on the day of its date, but on July 8, 1901. On or shortly after July 10, 1901, it was transmitted by the Surveyor General, of his own initiative, to the Commissioner of the General Land Office, and was received in the General Land Office on July 15, 1901. It is now authoritatively settled that the application was not effective for any purpose until the date of its receipt by the Commissioner; and it is only by a stretch of construction favorable to the State (and consequently to the appellant) that it can be deemed to have been filed with the Commissioner, within the meaning of the act, on the latter date.

In assumed compliance with the provisions of the act of 1894 requiring published notice of the application for survey, the Governor issued a notice dated July *6,* 1901,—two days before the delivery of the application to the Surveyor General and nine days before the date when the application was filed with the Commissioner and first became effective for any purpose. This notice, speaking from its date, declared that the Governor *had theretofore applied* under the act of 1894 for the survey of the townships named; and that those townships were reserved from other appropriation for a period to extend *from the time of such application* until the expiration of sixty days after the filing of the township plat of survey. As a matter of fact the Governor had *not* applied at the date of the notice, or at the time it was first published; and the notice was therefore false and misleading in a most essential particular. The authorities to which we shall refer demonstrate that it is fatal to a notice of this character if the date when the preference or reservation takes effect, as well as the period for which it runs, is incorrectly stated.

The notice was published in six weekly issues of an Idaho newspaper, commencing on July 10, 1901, and ending August 14, 1901. The act of 1894 provides that publication of the required notice shall commence "within thirty days *from* the filing of the application"; and that such publication "shall be continued for thirty days from the first publication." The word "from" as here used must be held synonymous with "after". As the notice was first published on July 10, five days *before* the filing of the application, that publication of the notice, at least, was ineffectual and must be disregarded. The construction most favorable to the State (and the appellant) is that the first publication made after the application was filed, viz.: the publication of July 17th, was the first effectual publication of the notice. And as it was last published on August 14th, the requirement of the statute that the publication "shall continue for thirty days from the date of the first publication" was not complied with.

The application for survey embraced eighteen townships, containing more than 403,000 acres of land; and the State had theretofore applied for the survey of a large number of other townships throughout the State, which had not yet been surveyed and from which no selections had been made. At that time the quantity grants to the State were largely satisfied; and as this was long before the establishment of the principal forest reserves, and the great losses which the State afterwards claimed to have suffered through the inclusion of "school sections" within such reserves were then unknown and unforseen, a relatively small acreage was required to satisfy the State grants under conditions then existing. And the area of available lands in townships for the survey of which the

State had theretofore made application, to say nothing of the townships named in the application of July, 1901, was enormously in excess of any apparent requirements.

Passing upon the application for survey in the light of these facts, the Commissioner, on July 19, 1901, held that the application in question was excessive and improvident, and declined to recognize or allow it. Due notice of this action was given to representatives of the State, but no appeal from the decision was taken. It has since been established that the action of the Commissioner was within the authority vested in him by law; that his order was subject to appeal under the rules and practice of the Land Department, and if erroneous, could have been corrected on appeal; and that, whether erroneous or not, the order became final and conclusive upon the lapse of the prescribed period without appeal.

The application for survey having been rejected by the Commissioner, no notice of such application was given to the local land officers and no notation or other record of the application or of any reservation of the townships named therein was entered upon the records of the local offices as required by the affirmative provisions of the act of 1894; nor was the notice of the application given by the Commissioner to the Surveyor General as required by that act. Neither was any action taken on behalf of the State to have the fact of the application or its claim of preference or reservation noted on the records of the local land offices. Therefore, when the Railway Company selected the land on July 23, 1901, and for many years thereafter, the records in the Coeur d'Alene Land Office (and the records of the General Land Office, as well) contained no showing of this application or of the State's preference

claim; but on the contrary it appeared from those records that the land was free from claim or appropriation and open to selection by the Railway Company.

In January, 1905, as a result of some subsequent efforts on the part of the State and a supplementary application for survey of the townships in question, followed by a deposit by the State to cover the cost of survey, the General Land Office was persuaded to accord a qualified recognition to the claim of the State as to certain of the townships embraced in the application of July, 1901. And on January 20, 1905, the Commissioner addressed a letter to the Register and Receiver of the Coeur d'Alene Land Office directing those officers to give notice by publication of the reservation of the specified townships

> *"from and after * * * January 18, 1905, and for a period extending from January 18, 1905,* until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office * * * during which period the State authorities may select any of the lands situated in said townships, *which are not embraced in any adverse claim".* (Record, p. 132.)

The first entry ever made in the Coeur d'Alene Land Office which in any way recognized, or was based upon, this application for survey, was the entry made in obedience to the Commissioner's letter of January 20, 1905. And that entry, by its express terms, indicated that the right of the State dated from January 18, 1905, and was subordinate to claims initiated prior to that date. It was at one time assumed, that this action gave the State a preference right dating from January 18, 1905; but subsequently, upon full consideration, the Department finally held (and this position has been consistently adhered to

ever since) that the application for survey was ineffective for any purpose, and that the State acquired no preference right whatever thereunder.

On July 30, 1909, after the filing of the township plat of survey in the local land office, application was made in the name of the State of Idaho to select this and other land in the township, under the indemnity provisions of the State school land grants, in lieu of certain designated sections 16 and 36 alleged to have been lost to the State by reason of their inclusion in forest reserves. The proffered selections were rejected, and the rejection affirmed by the Secretary on appeal. It was held that the application for survey made by the State under the act of August 18, 1894, never became effective, and that the State acquired no preference right thereunder. And it was further held that even should it be conceded that the State had a preference right of selection, nevertheless under the constitution and laws of Idaho, as construed by the Supreme Court of that State, the representatives of the State were without authority to make selections in lieu of the bases tendered; that an act of the legislature of Idaho passed February 8, 1911, had no retroactive effect; and that the proffered applications to select were in and of themselves unauthorized and void. It was also held that neither the application for survey, nor the attempt by the officers of the State to select the land in July, 1909, in any manner prejudiced or affected the validity of the Railway Company's selection of July 23, 1901; that that selection was in all respects regular and valid, and entitled the Company to the land; and that as Delany's settlement was made two years after selection by the Railway Company,

he acquired no rights thereunder. As already stated, the State acquiesced in the decision and is out of the case.

2.

In disposing of this question the learned trial judge said (Record pages 138-145):

> "The defendant Railway Company filed its selection lists, under the exchange provision of the act of March 2, 1899, (30 Stat. 993), on July 23, 1901, about a year before settlement by any person. A few days prior to such selection, however, the State of Idaho had made application for the survey of a large body of land, including that in controversy, under the provisions of the act of August 18, 1894, (28 Stat. 373, 394), and the question is, whether the proceedings taken by the State prior to July 23rd operated so far to withdraw the land from the public domain that it could not be selected by the Railroad Company either absolutely or conditionally. By the Land Department the question was answered in the negative, first, because there was no valid, effective application for survey before the Railroad Company filed its selection list, and, second, because, by the settled construction of the Department, lands, even though embraced in a valid application for survey by the State, may be selected by a Railroad Company subject to the State's preference right. Such preference right the State has here failed to assert, and no claim upon its part is presently involved.
>
> "Under the act of 1894 it is provided that (a) the application for survey must be made by the Governor of the State to the 'Commissioner of the General Land Office', (b) notice of the withdrawal or reservation of the land is to be immediately given by the Commissioner to the Surveyor General of the State, and to the district Land Office, and, (c), within thirty days from the filing of the application, the Governor of the State must give notice of the application by publication for thirty days in a local newspaper. The lands so to be surveyed 'shall be reserved, upon the filing of

the application for survey, from any adverse appropriation, by settlement or otherwise, except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of filing the township plat' in the proper district Land Office.

"On July 8, 1901, the Governor of Idaho filed with the Surveyor General an application bearing date July 5th, for the survey of eighteen townships, including township 43 North, Range 4 East, and by the Surveyor General the application was sent to the Commissioner of the General Land Office, by whom it was received July 15th. It is clear, I think, that the application did not become effective for any purpose until it reached the General Land Office, and such is the holding of the Land Department. A notice bearing date July 6th was published in six weekly issues of a local paper, the first publication being on July 10th, and the last on August 14th. Assuming that the first effective publication was that of July 17th, two days after the receipt of the application by the Commissioner, I am inclined to the view that sufficient notice was given to meet the requirements of the law; the publication was made in every issue of the paper published during the thirty-day period following the filing of the application.

"As already stated, the application was for the survey of eighteen townships, or approximately 403,000 acres, and other applications of a similar character were pending. Taking cognizance of the vast area thus applied for, and of the limited right of selection remaining in the State, the Commissioner, on July 19, 1901, considered the application in question to be excessive, and declined to recognize it. *No appeal having been taken by the State from his ruling, the same became final and binding,* provided, of course, that the Commissioner was acting within his jurisdiction. The application having been declined, *no notice of its filing was given to the district Land Office, and no notation was ever made upon the township plats in that office or upon any of its records,* of the reservation or withdrawal of the land. Such was the

status of the application and of the Land Office records, when, upon July 23rd, the Railroad Company filed its selection lists. Later, in January, 1905, it seems that as a result of certain supplementary proceedings, the General Land Office recognized the preference right of the State, *but only from January 18, 1905, not from July 15th, 1901,* as appears from a letter of date January 20, 1905, from the Commissioner to the Register and Receiver of the district Land Office, by which the latter officers were directed to give notice of the reservation of certain townships, including 43--4, 'from and after * * * January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office, * * * during which time the State authorities may select any of the lands situated in said township, which are not embraced in any adverse claim'.

"Upon the question of the power of the Commissioner to reject an application for survey, the act of 1894 is equivocal, and the rulings of the Land Department have not been entirely uniform, the later decisions, however, being in support of such jurisdiction. *N. P. R. R. Co. v. Idaho,* 39 L. D. 583; *Thorpe v. Idaho,* 43 L. D. 168; *State v. Roberson,* 44 L. D. 448. (Also the decision here involved.)

"The language of the act, it is thought, is more readily susceptible to the construction adopted in the first decision, but in practical administration such a meaning gives rise to the most serious difficulties. In that view, a State with an unsatisfied grant of a thousand acres could, by the very simple and inexpensive process of filing an application in the General Land Office and publishing a notice for thirty days, withdraw from entry the entire area of public land, however great, within the State. Is it possible that Congress contemplated or intended such a result? By the terms of the act, the application for survey must be made only 'with a view to satisfying the public land grants * * * to the extent of the full quantity of the land called for' by the granting acts. Is not the right, therefore, to be regarded as commensurate with the needs of the State? I am not suggesting

that the amount applied for cannot in any case properly exceed the unsatisfied grant. The application must be for an entire township, whereas a smaller amount might be sufficient to satisfy the grant. But giving consideration to the extent of the grant and the character of the lands, and the interest of the Government in having its public lands disposed of and not needlessly withdrawn from entry, it is thought that the area to be surveyed must bear some reasonable relation to the area the State has the right to select. Such being the extent of the right or privilege conferred upon the State, it follows that an application for an excessive survey, being unauthorized, is ineffective, and it is for the officers of the Land Department, charged as they are, with the sale and disposition of public lands, to determine whether in any given case the application is within the law. In any other view I am unable to see how the interest of the Government can be protected. If therefore in fact the application under consideration was found to be excessive, the Commissioner of the General Land Office did not exceed his jurisdiction in declining to recognize it, and in refusing to take any steps to carry it into effect.

"It is further contended by the plaintiff that, defective though it may have been, the application served to withdraw the land from the operation of the act of 1899, reference being had to the familiar principle that the segregative effect of an entry or other selection is not necessarily dependent upon its inherent validity. *Holt v. Murphy*, 207 U. S. 407; *McMichael v. Murphy*, 197 U. S. 304; *Hodges v. Colcord*, 193 U. S. 192; *Sturr v. Beck*, 133 U. S. 541; *Edith G. Halley*, 40 L. D. 393. If, however, as is held, the Commissioner of the General Land Office had the power to reject it, *the application never became operative for any purpose. To have segregative effect, an invalid application or entry must in some way be accepted or recognized by the Land Department;* having been allowed, even though erroneously, it is binding upon and segregates the land. *But here at the very outset there was a declination to recognize the application.* If, however, we assume that the application was valid, and that the Commissioner was without power to re-

ject it, it must be borne in mind that it constituted no offer to enter the land, but amounted only to a request to have it surveyed. *The land was not entered or selected; the State made no specified claim*, and it might ultimately decide not to select a single subdivision. True, the terms 'reserved' and 'withdrawn' are used in the act, but when we consider its intent and purpose, clearly the only effect contemplated was to confer upon the State a preference right to select, at its option. *By the filing of the application the State initiated no claim or right to any portion of the land.* As has been very properly held by the Land Department, I think, the position of the State is closely analagous to that of a successful contestant after the cancellation of record of the contested entry. The land embraced in such entry is, as a result of the cancellation, fully restored to the public domain, and is no longer segregated or reserved, but the contestant possesses the preference right of entry. Accordingly, following the practice in relation to such contested entries, the Department holds that the pendency of such preference right does not operate to prevent the filing of other applications, subject to such preference right. *Stewart v. Peterson*, 28 L. D. 515; *Cronan v. West*, 34 L. D. 301; *State v. N. P. R. R. Co.*, 37 L. D. 70; *Swanson v. N. P. R. R. Co.*, 37 L. D. 74; *Delany v. N. P. R .R. Co.*, unreported, decision November 18, 1915). No good reason is apparent for holding such a practice illegal.

"Our attention is directed to the language of the act of March 2, 1899, creating and defining the limits of the right of the Railroad Company to select, wherein it is authorized 'to select, in exchange for lands relinquished by it, an equal quantity of non-mineral public lands * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection', etc. But this language does not alter the question. Neither can a citizen rightfully settle upon or enter land unless it be public land, not reserved, and to which no private rights have attached or been initiated, etc. And yet the plaintiff asserts the right of her predecessor to settle upon and claim the land in controversy long after the state filed its

application, and after the Railroad Company filed its selection. The right of the Railroad Company to select is quite as broad as the right of the citizen to 'homestead'. As already suggested, by its application for survey the State initiated no claim to this land; it was merely given a certain length of time to determine whether it would make such claim, and while the term 'reserved' is used, plainly there is no reservation in the ordinary sense, as for some Governmental purpose. The moment the preferential period in favor of the State expires, the lands may be entered by any qualified person, the same as in the case of other public lands.

"In view of these considerations, it is thought that the Land Department acted upon a proper construction of the law, and accordingly the plaintiff's bill will have to be dismissed, and such will be the order."

The question at issue is so ably and exhaustively dealt with by the Court below, that we might well submit the case upon his discussion of it, without further argument. But because of the importance of the question, it seems best to supplement the opinion with some of the reasoning and authorities which were submitted to the trial court and which, presumably, influenced the decision.

3.

Now, of course, if there was no valid application for survey, there was no "reservation" or "withdrawal" of the land, under any possible construction of the act of 1894. It is only upon the theory that the land was reserved or withdrawn as the result of an application for survey, effective before selection by the Railway Company on July 23, 1901, that the validity of that selection can be questioned. This is plain enough on principle and from the

language of the act itself, but it is also settled by a long and unbroken line of Departmental decisions. Whatever doubt or uncertainty may have for a time existed with respect to the construction and effect of some of the provisions of the act of 1894, there was never any doubt or uncertainty as to this proposition.

William E. Cullen, 32 L. D. 240.
McFarland v. State of Idaho, 32 L. D. 107.
Kay v. State of Montana, 34 L. D. 139.
State of Washington, 37 L. D. 2.
State of Idaho v. Northern Pacific, 42 L. D. 118.
Thorpe v. State of Idaho, 43 L. D. 168.

It is also well settled that the steps which the act requires to be taken on behalf of the State, are conditions precedent, and that strict compliance with such provisions is essential.

In the case of *William E. Cullen*, 32 L. D. 240, the Department said:

> "The law grants to the State a special privilege in derogation of the common right of others to appropriate the public domain under the general land laws, and must be strictly construed and the State held to strict compliance."

This principle has been reaffirmed and applied in a number of cases, including *State of Idaho v. Northern Pacific*, 42 L. D. 118, where the Secretary quoted the following language from the opinion of the late Justice Lurton, then Circuit Judge, in *Campbellsville Lumber Co. v. Hubbert*, 112 Fed. 718, 724, (a decision in which Mr. Justice Day, then Circuit Judge, concurred):

> "An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed; and the validity of all acts done under the authority of such an act will depend upon a compliance with its terms. In respect to such acts the steps pointed out for the acquisition, preservation and enforcement of the remedies provided should be construed as mandatory, rather than optional. (Citing *Sutherland on Statutory Construction,* Sections 454 and 458 and other authorities.)"

In many of the cases cited above the question turned upon the sufficiency of the notice and publication required by the act of 1894; and in all those cases it is held that a proper notice, and publication thereof in strict accordance with the terms of the statute, are absolutely essential. The learned trial judge was inclined to think that the publication of the notice involved in this case might be held sufficient, notwithstanding the irregularities pointed out; and he does not appear to have considered the defect in the notice itself. Of course, in the view which the Department and the Court below have taken of the matter (and which we ourselves take) it is quite immaterial whether the notice and publication were good or bad. And we shall spend no more time on the point, save to assert our confident belief that the notice and publication were fatally defective, and the application for survey ineffectual for this reason, even if it could be sustained as against other objections; submitting the question on the authorities cited above and those which follow:

Rondout v. First National Bank, 37 Ill. App. 296.

Metropolitan Bank v. Moorehead, 38 N. J. Eq. 493.
Early v. Doe, 16 How. 610.
State v. Tucker, 32 Mo. App. 620.
State v. Cherry County, 58 Neb. 734, 79 N. W. 825.
Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953.

4.

Appellant's counsel make no real attempt to uphold the validity of the application for survey, unless this is to be implied from their somewhat extended reference to the opinion of Assistant Secretary Pierce in *Northern Pacific v. State of Idaho,* 39 L. D. 583, (which has since been repudiated and overruled by the Department). Their position appears to be that as the validity of the application was for a time assumed by the Department, it was sufficient to defeat the Railway Company's selection, notwithstanding the earlier decisions recognizing the application were erroneous in law and fact and have since been recalled and vacated. This is a question which will be discussed hereafter.

Little need be added to what the trial court has said respecting the application for survey. It is apparent, as the court below points out, that (aside from all other considerations) the action of the Department in rejecting and disallowing the application was sufficient to prevent the attaching of any rights thereunder, unless the Department was wholly without jurisdiction to pass upon and reject the application as improvident and excessive, in any conceivable state of facts. For if there was *jurisdiction,* the

ruling of the Commissioner, involving (as it did) a determination of fact, and being acquiesced in by the State without appeal, was final. It is not for the court to say, at this time, whether the Commissioner was right in holding that the particular application was excessive in the light of the facts then before the Department. The only theory upon which that action could now be reviewed and overridden is that the act of 1894 gave the State an absolute right to tie up every acre in every unsurveyed township in the State, although a single quarter section would have been sufficient to satisfy completely its unfilled grants.

Confusion may result unless attentive consideration is given to the later decisions of the Department dealing with the question. For while it is now well settled that this particular application for survey was inoperative and ineffectual, and neither conferred any right on the state nor constituted an obstacle to claims initiated after it was made, nevertheless in some of the earlier decisions a contrary view was taken. The rulings in favor of the State in the earlier cases seem to have been due partly to failure to give due consideration to the facts surrounding the application for survey, and partly to an erroneous view of the functions and authority of the Commissioner in proceedings under the act of 1894. See *Thorpe v. State of Idaho,* 35 L. D. 640, 36 L. D. 479, 42 L. D. 15; *Williams v. State of Idaho,* 36 L. D. 20, and *Northern Pacific v. State of Idaho,* 39 L. D. 583. But on further consideration of the same cases, those decisions were recalled and revoked, and it was expressly held that the application for survey never became effective, and that the State never acquired any preference right thereunder; much less that a reser-

vation or withdrawal of the lands resulted. *Thorpe v. State of Idaho,* 43 L. D. 168. And this conclusion has consistently been followed in all subsequent decisions on the subject, some of which are cited below:

State of Idaho v. O'Donnell, 44 L. D. 345.

State of Idaho v. Roberson, 44 L. D. 448.

Northern Pacific v. State of Idaho, 45 L. D. 37.

McDonald v. Northern Pacific, Secretary's decision of October 30, 1914, unreported, Record, pp. 133-135.

Delany v. Northern Pacific, Secretary's decision of November 18, 1915, unreported, Record, pp. 119-121.

State of Idaho v. Northern Pacific, Commissioner's decision of July 16, 1914, unreported, Record, pp. 86-97.

And see: *State of Idaho v. Northern Pacific,* 42 L. D. 118.

It is to be borne in mind that the latest decision in the Thorpe case (43 L. D. 168) represents the final action of the Department in the very cases in which contrary views are found expressed—so that the earlier decisions reported under the title of *Thorpe v. State of Idaho* and *Williams v. State of Idaho* must be regarded as mere interlocutory rulings which were rejected on final hearing and which therefore have no value as precedents. This may not be strictly true as applied to the decision in *Northern Pacific v. State of Idaho,* 39 L. D. 583, on which appellant so much relies, since that case did not involve the particular lands dealt with in *Thorpe v. State of Idaho,* 43 L. D. 168. But it *did* involve land in the same townships, and it presented the same questions. And the conclusions of the opinion in 39 L. D. 583 are inconsistent with and were

expressly overruled and repudiated in the later Thorpe decision and in the cases cited above which follow and apply that ruling. It seems strange that appellant's counsel should put so much emphasis upon a discredited and overruled case, which has no longer any standing as authority in the tribunal that rendered it.

It may now be regarded as established, so far as the Department has power to settle such a question, that the 1901 application for survey was inoperative, at least against claims initiated before January, 1905, for three independently sufficient reasons:

(1) Because the application for survey was rejected and disallowed by the Commissioner, whose decision became final for want of appeal and could not afterwards be questioned, whether right or wrong;

(2) Because when the Commissioner was finally persuaded, in January, 1905, to accord a qualified recognition to the claim of the State, the reservation and preference right then allowed was expressly made to date from January 18, 1905, and it was so noted on the records of the Land Department and in the Coeur d'Alene Land Office, and the State acquiesced therein;

(3) Because of failure to make substantial compliance with the requirements of the act of 1894, which are made conditions precedent to the attaching of the privilege conferred by the act, including the very important requirement for notation on the records of the Local Land Office of the fact that an application for survey had been made and that the State claimed a preference right thereunder—a provision

essential for the protection of the public and intending claimants as well as for the information of the local land officers.

It should be remembered that at the time the Railway Company filed its selection list on July 23, 1901, eight days after the application for survey was filed with the Commissioner of the General Land Office in Washington, that application had been rejected and disallowed by the Commissioner; the Company was without notice or knowledge that such an application had been made; the records of the Coeur d'Alene Land Office showed the land to be free from any sort of claim and open to selection by the Company (and did for three and a half years thereafter); the Company's selection was accepted and allowed by the local officers; and the representatives of the State had acquiesced in the rejection of the application for survey and for some years thereafter took no steps to assert or give notice of its alleged prior claim.

5.

Laying Departmental rulings out of sight for a moment, and looking at the question from a practical standpoint, and in the light of the language and intent of the statute, it is rather startling to consider how far the Court must travel to come to a decision overturning the patent in this case and awarding the land to appellant on the strength of Delany's rejected homestead application. It must be held that the attempted application for survey made by

the State under the act of 1894 was valid and operative, notwithstanding its disallowance by the Commissioner by an order from which no appeal was taken; notwithstanding the serious, if not fatal, defects in the matter of notice and publication; notwithstanding the fact that no notation of the application for the State's claim of preference right thereunder was made upon the records of the Land Department or the local land office until 1905; notwithstanding the affirmative ruling in 1905 by which the period reserved for the exercise of the State's preference right was made to date *"from and after January 18, 1905"*, and the acquiescence by the State in that ruling. And having sustained the application, it must be held further that by virtue thereof the lands were withdrawn and placed in reservation, so as to bar other forms of appropriation; although this is foreign to the purpose which the act was intended to serve; unnecessary to the protection of the privilege conferred upon the State; contrary to the established practice of the Department and a long line of Departmental decisions; and inconsistent with and subversive of the spirit and purposes of the general land laws. And this is a case where the State's attempted selection of the land was rightly rejected by the Department as unauthorized and void; where the State itself has acquiesced in that decision and makes no claim to the land; where the issue now rests between a party claiming under patent of the Government based upon a proper selection made on July 23, 1901, and a party claiming under an unsuccessful homestead application based upon an alleged settlement two years later; and where the settlement of the adverse claimant was just as much in conflict with the reservation

and withdrawal, if any such existed, as was the prior selection.

Suppose it were conceded that a valid application for survey would effect a reservation or withdrawal of the land and segregate it against other claims; and suppose it be also conceded that, as held in the earlier cases, it was beyond the power of the Commissioner to reject the application for survey to the prejudice of the rights of the State, and that there was a sufficient compliance with the requirements of the act of 1894 to secure to the State a preference right of selection. It is nevertheless a very different thing to hold, in a contest between individual claimants in which the State has no interest, that the lands were put in reservation and segregated against other appropriation by an application for survey which the Land Department rejected and refused to recognize, and of which no record was made in the local land office until years after selection by the Railway Company.

6.

Let us now consider, as a question of law, what the rights of appellant would be on the assumption that the application for survey should be held valid and operative. Appellant's present contention was disposed of by the Secretary of the Interior in his decision of November 18, 1915 (Record page 120) in the following language:

> "In his appeal Delany urged that the selection did not defeat his settlement because it was erroneously received and filed in the local office, and is inoperative, for the reason that an application had been made by

> the State of Idaho prior to the date on which the list was filed, for the survey of the township in which the land is located under the act of August 18, 1894, and was pending at the time the (selection) list was filed, and, therefore, prevented the acceptance and filing of the list. This contention is contrary to the holding of this Department in the closely kindred case of *Swanson v. Northern Pacific Ry. Co.*, 37 L. D. 74. The decision in that case is in harmony with the established practice of the Land Department, which sanctions the receipt and filing of applications for lands while they are subject only to mere preferred rights and appropriations, (*Stewart v. Peterson*, 28 L. D. 515-519)".

Appellant relies upon the words "reserved" and "withdrawn" as they appear in the act of 1894, and leans heavily upon the abandoned and overruled Departmental decision of March 20, 1911, 39 L. D., to which reference has already been made. But that case is a broken reed, since it is the one departure from a long line of Departmental decisions, covering a period of more than twelve years, which deal with similar claims based on these words of the act of 1894 and the provisions of other acts of similar purpose. And it has uniformly and consistently been held, over and over again, that such acts merely confers a preference right, and do not contemplate an absolute reservation or withdrawal of the land such as will prevent the initiation of other claims thereto in the interim between the date when the right takes effect and the expiration of the preference period.

Swanson v. Northern Pacific, 37 L. D. 74, cited by the Secretary in the Delany case, was decided about ten years ago. In the Swanson case the precise point here at issue, arising upon facts precisely similar, was squarely pre-

sented to and decided by the Department. In that case, as in this, the Railway Company selected the land under the act of March 2, 1899, at a date subsequent to application for survey by the State, which was assumed to be valid. After selection by the Company, but prior to survey, Swanson made a homestead settlement, and on his behalf it was asserted that the application for survey made by the State under the act of 1894 operated to withdraw or reserve the land so as to prevent selection thereof by the Railway Company under the act of 1899. As Swanson remained in settlement on the land at the time of survey, and at the time when the State's preference right expired, his entry must have been allowed unless the Company's selection was held valid from its inception. The Department held the Company entitled to the land, saying:

> "It is contended further that the application of the State of Idaho for a survey of the township of which the tracts applied for are a part, made prior to the selection by the Railway Company, operated to reserve the land from other disposition until after the expiration of three months from the filing of the approved plat of survey, and as his settlement was made and his homestead application presented prior to the expiration of said period, his entry should have been allowed. *The effect of the application of the State was not, however, to place the land in reservation, but only to secure to the State a preferred right to select the lands covered by its application. It did not operate to prevent the filing of other applications for the land subject to the superior right of the State.* In this case the State made no attempt to exercise its preferred right of selection, and there was therefore no bar to the consideration of other claims the same as though such right had never existed."

Again, in *State of Idaho v. Northern Pacific,* 37 L. D. 70, the same question arose; and it was there said:

> "It is contended that the Company was not entitled to select under the act of March 2, 1899, supra, * * * lands for the survey of which application was made by the State. * * * The objection that the lands were not subject to selection by the Company because embraced in the State's application for survey, even if well taken, could not be interposed as to the tracts applied for by Hooper. * * * As to Perkins, the objection, if valid, would only be material in so far as it relieved him from the necessity of proving his prior settlement. *The application of the State for survey did not, however, operate as an absolute withdrawal of the land described therein, but only subjected such lands to the preferred right of the State to select them within sixty days from the time of the filing of the approved plats of survey.*"

Appellant's counsel says that the italicized language in the quotation from the *State of Idaho v. Northern Pacific* "is mere *obiter dictum*"; and he brushes aside the decision in *Swanson v. Northern Pacific* with the statement that the decision "is based entirely upon the decision in the case of *State v. Northern Pacific, supra*, and the question here involved *was not raised or discussed.*" These suggestions are sufficiently answered by reference to the foregoing quotations and the statement of facts and decision in the Swanson case which precedes the quotation from that opinion.

The most recent cases in which this question has been considered and decided by the Department are *Northern Pacific v. State of Idaho*, 45 L. D. 37, and *Verdine R. Hall*, 45 L. D. 574. In both cases the contention now made by appellant, on arguments precisely similar to those which she presents, is carefully examined in the light of the statute and it is held (as it was held ten years ago in the Swanson case) that the effect of the act of 1894 is merely to confer a preference right and that it does not place the

land in reservation. These cases represent the last word of the Department on the subject; and because of the facts, and the line reasoning adopted, are precisely in point on the present question.

In the leading case of *Heirs of Irwin v. State of Idaho*, 38 L. D. 219, it was said:

> "In disposing of the State's claim it is sufficient to say that the question presented, or questions entirely similar, have been repeatedly determined by this Department and the courts. The preference right awarded the State by the act of 1894 seems to be in no way superior to the preference right awarded the successful contestant by the act of May 14, 1880, supra. * * * *The act of 1894 merely gives the State a preference right of selection* over all other applicants, and in thus inviting the State to apply for the survey of lands whereby a preference right over others may be secured, the Government in no way commits itself or agrees to withhold the lands from any disposition which it may find necessary to make of the same."

State of Utah, 33 L. D. 358, is another much cited case; and it was there said:

> "Waiving the question as to whether the record shows sufficient compliance with the act of 1894 on the part of the State in the matter of the publication of notice, *it is clear that the only right intended to be granted the State was that of a preference over other intending claimants* under the public land laws, to make selections of such lands as it desired and needed, within the period of sixty days after the filing of the township plats of survey, and that under the State's application no such claim attached as prevented the appropriation of the lands by the United States under an act of Congress until formal selection thereof had been made by the State."

In the Attorney General's opinion of September 15, 1909, (38 L. D. 224), which was in part the basis for the deci-

sion in the Irwin case, full consideration was given to the doctrine previously declared by the Department that an application for survey under the act of 1894 does not result in the segregation or reservation of the land, but operates merely to give the State a preference right of selection; and the Attorney General concluded that this construction of the statute is not only reasonable, but plainly right; and that it should be consistently adhered to by the Department. In discussing the State of Utah case cited above, the Attorney General says:

> "This decision was on the ground that the sole claim of the State * * * rested upon the application of the Governor for a survey of the land, whereas the only right intended to be conferred upon the State by the act of August 18, 1894, was simply one of preference over other intending claimants to the unsurveyed public lands."

In *Cronan v. West,* 34 L. D. 301, it was said:

> "The preference right given by the act of March 3, 1893, is analogous to the preference right of a successful contestant *and does not segregate the land against other applications;* and they are entitled to be received, subject to the State's right, and if that is not exercised, take effect from their presentation."

See also: *State of Idaho v. Northern Pacific,* 39 L. D. 343, and *Northern Pacific v. Mann,* 33 L. D. 621.

7.

It is a cardinal rule of statutory construction that the intent of Congress is to be sought, not merely in the bare words of its enactments, but also in the light of the evident

aims and objects of the act considered; and that the interpretation to be placed upon terms used in the act shall be that which will carry out the purpose Congress sought to effect, without unnecessarily disturbing settled conditions and established rules of law and policy, the disturbance of which is really foreign to the purpose of the legislation and unnecessary to the full accomplishment of the object of the act. This is especially true where the contrary interpretation works out a result more or less inconsistent with the policy of other congressional enactments and with the public interest. In such a case the courts will not hesitate to restrict the broad language of a statute to a meaning which, while it carries out fully the manifest intent of Congress, does not go beyond the legislative purpose and work results which the law-making power evidently did not contemplate or desire.

We quote below the language of some of the leading decisions of the Supreme Court of the United States which deal with this subject; prefacing, however, with a statement of the rule given by Sutherland in his great work on Statutory Construction, which has frequently been quoted and applied by various state and federal courts.

> "It is indispensable to a correct understanding of a statute to inquire first what is the subject of it; what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained, and its general intent, a key is found to all its intricacies; general words may be restrained to it, and those of a narrower import may be expanded to embrace that intent. * * * *General words may be cut down when a certain application of them would antagonize a settled policy of the State.* * * * Mr. Justice Field said: 'Instances without number exist where the meaning of words in a statute has been enlarged or restricted, and qualified to carry out the intention

of the legislature'. * * * The intention of an act will prevail over the literal sense of its terms. * * * The true meaning of any clause or provision is that which best accords with the subject and general purpose of the act."

Sutherland Stat. Constr. (1st Ed.), Secs. 218-219.

"The statute * * * must be examined in the light of the objects of the enactment, the purposes it is to serve, and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

Fuller, C. J., in *United States v. American Bell Telephone Co.,* 159 U. S. 548, 549.

"It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

Taney, C. J., in *Brewer v. Blougher,* 14 Pet. 197, 198.

"If a literal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment."

Davis, J., in *Heydenfeldt v. Dancy Gold Min. Co.,* 93 U. S. 638; quoted with approval in *Hawaii v. Mankichi,* 190 U. S. 197, 213.

"But the subtle significance of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which it was its purpose to frustrate."

White, J., in *Rhodes v. Iowa,* 170 U. S. 412, 422.

"If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention."

Davis, J., in *Reiche v. Smythe,* 13 Wall. 162.

"It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

Brewer, J., in *Holy Trinity Church v. United States,* 143 U. S. 457, 472.

It may be that the act of August 18, 1894, if read literally and without regard to the evident object of Congress and the general policy of legislation with respect to the public domain, might be thought to provide that the application for survey should operate to withdraw or reserve the lands absolutely from any appropriation before sur-

vey. But the mere words of the act cannot be considered apart from its plain intent and purpose. And this was not what Congress intended. The object of the act was to enable the State to secure for itself a preference right of selection. The State is not authorized to make selections before survey; and it was claimed that the most desirable lands were being taken up while still unsurveyed, so that when the time came at which the State might exercise its right to select in satisfaction of its land grants, the valuable lands would all be appropriated. Therefore Congress was induced to make provision which would permit the State, by taking the prescribed steps, to secure a first right of selection which should be superior to claims initiated after those steps were taken.

In order that the object of the enactment may be fully attained, and the State given the fullest possible protection, it is only necessary to hold (as the Department has heretofore held) that compliance with the act gives to the State a preference right of selection superior to all claims initiated after the application for survey. It is *not* necessary for the protection of the State or to effectuate the objects of the enactment to hold that the application for survey operates to reserve, withdraw, or segregate the land, so as to bar the initiation of rights thereto subject to the superior claims of the State. Such a rule does not help the State at all, and has no tendency to accomplish the purpose of the act. If the State has a preference right of selection under the act, it has everything which can possibly benefit it. The view that the application for survey creates an absolute reservation of the land is in no respect to the advantage of the State as a proprietor, and is directly to its disadvantage from a governmental stand-

point, since it tends to discourage settlement and development.

The mischiefs which Congress sought to remedy in the act of 1894, and the advantage which it was intended to give to the State, are so plain and obvious that it is hard to see where respectable ground can be found from which to argue for a construction of the act of 1894 different from that heretofore given it by the Department. And it ought not to be necessary to carry the discussion farther. But there is another reason against the view that the act effects an absolute reservation of the land which is worthy of consideration.

The policy of the Government for many years past has been to encourage settlement upon unsurveyed lands, and there has been much legislation for the protection of such settlers. There has also been considerable legislation providing for the selection or other appropriation of unsurveyed lands, the grant of the right to select unsurveyed lands being frequently held out as a consideration for relinquishments and exchanges which could not have been obtained had the sole inducement been the right to make selections after survey. Except where lands have been withdrawn before survey for a definite national use, as for Indian, military, or forest reservations, or for national parks, it has never been the policy of the Government to prohibit, limit, or discourage settlement on unsurveyed lands or the appropriation thereof under acts permitting the selection of such lands. Where withdrawals or reservations have been made, it has always been for some such definite purpose—and this is equally true of temporary withdrawals made pending the consideration of

the question whether the lands should be permanently withdrawn.

At an earlier stage of the history of the public grants for internal improvements, great tracts of land were frequently withdrawn by the Department for the protection of the beneficiaries of railroad and other grants, in advance of the time when rights under the grants could attach to specific lands. At first these withdrawals were sustained by the lower courts, and were not prohibited by Congress—indeed, in some of the earlier cases the courts seemed to find express Congressional authority for such withdrawals. But this practice was long ago overthrown and abandoned, and in their later decisions the courts have held that such withdrawals were unauthorized and void, although made by the Secretary under supposed authority of statute. In short, the withdrawal of large bodies of land in aid of the beneficiary entitled to a portion of the land so withdrawn, or entitled to make selections therefrom in satisfaction of a quantity grant, is a practice which has been condemned and abandoned; and if this act is open to such an interpretation, we think it is the only example of such legislation which can now be found.

8.

Let us concede for the moment that the language of the act of 1894 is fairly open to either construction—let us even concede that upon the face of the statute, and as a matter of first impression, the construction against which we argue is the one which the Department might now adopt if the question were before it for the first time.

Nevertheless the statute has been construed otherwise by the Department; that construction has been applied in a number of decisions; large quantities of land have been disposed of in that view; vested rights have attached; and it is doubtless true that numerous settlements and other claims have been initiated on the faith of the rule declared in previous departmental decisions. In this situation it seems especially appropriate to refer to the well settled rule that where an act is in any degree doubtful or ambiguous, in language or intent, the construction placed upon it in contemporary administration by the Department charged with the duty of executing it, is entitled to great weight; and where such construction has been recognized and applied over a series of years, it should be deemed conclusive—even though such construction may be of doubtful correctness when considered as an original proposition.

La Roque v. United States, 239 U. S. 62, 64.
Logan v. Davis, 233 U. S. 613, 627.
United States v. Hammers, 221 U. S. 220, 228.
Louisiana v. Garfield, 211 U. S. 70, 76.
Hewitt v. Schultz, 180 U. S. 139, 156, 163.
United States v. Alabama, etc., Railroad, 142 U. S. 615, 621.
Heath v. Wallace, 138 U. S. 573, 582.
United States v. Moore, 95 U. S. 760, 763.

9.

In this Court, as in the court below, appellant leans rather heavily on the decision of the Supreme Court in *St. Paul, Minneapolis and Manitoba Railway Company v.*

Donohue, 210 U. S. 21—although we have never been able to understand why. The Donohue case, like this, involved a conflict between a homestead settlement claim and a lieu selection under an act similar to that of March 2, 1899. But that case is otherwise the exact opposite of this; since there the homestead settlement was made two years *before* selection by the Railway Company. The question debated by the Supreme Court in the Donohue case was whether the circumstances of the prior settlement were such as to attach a valid claim to the land, which was subsisting and in force at the time of the Railway selection. And having concluded, although with some difficulty, that there was a valid and subsisting settlement claim, the Court applied the rule that the existence of such a claim prevented its selection under an act like that of March 2, 1899.

We have never disputed the existence or correctness of this rule, and do not now. But we are unable to see what it has to do with the present case, since it is admitted that there was no settlement on the land here in controversy until long after its selection by the Railway Company. And there is no connection whatever between the rule applied in the Donohue case, and the contention that a general preference right segregates the land absolutely against the initiation of other claims during the preference period—as to which see the authorities last above cited.

10.

The Donohue case is also referred to by appellant's counsel in connection with other authorities which they invoke, in support of their contention that the application

for survey, notwithstanding its invalidity, and not withstanding the refusal of the Land Department to allow or recognize it prior to 1905, nevertheless operated to withdraw the land from the public domain and segregate it against other forms of appropriation. This theory is very effectively disposed of by the opinion of the learned trial court. Its primary and essential fallacy lies in the failure to distinguish between the effect of a blanket application for survey under the act of 1894, and the effect of a specific claim to appropriate particular land by homestead settlement, entry, selection, or other form of appropriation under the public land laws.

In the latter case a specific, positive and unqualified claim of right to appropriate the particular land is fastened upon the land by the initial steps prescribed by law. And it is settled law that when such a claim is recognized and allowed by the local officers in a preliminary way, and becomes a matter of record in the Land Department, the land is segregated from the public domain; and while the entry or selection remains uncancelled and intact of record, the land is not subject to any other form of appropriation, and no rights can be acquired by subsequent settlement, selection or application to enter. An application for survey under the act of August 18, 1894, has no such characteristic. It is, in form and substance, a mere blanket application to the Land Department for the *survey* of a designated township or townships. By virtue of the statute the effect of the application, *if the conditions of the act are complied with,* is to give the State a preference right to select, running for a specified period, which may be exercised or not at the pleasure of the State. It does not commit the State to the selection or acceptance

of any particular land in the township, nor even to the selection of *any* land therein, in satisfatcion of its grants. It does not amount to an assertion of right to any particular land, nor fasten a claim upon any tract. The difference between the effect of a blanket application of this character and the effect of an ordinary entry or selection of particular land is as wide as the difference between day and night.

It is for this reason that the Department has repeatedly held that application for survey under the act of 1894 is *not* a barrier to the initiation of a claim under public land laws, subject to the preference right of the State; and that it gives the State no right to the land as against a subsequent withdrawal for a forest reserve under a proclamation containing an excepting clause in favor of any entry, filing or "lawful claim"—although such exception is held to protect fully a homestead settlement, timber and stone or desert land entry, or lieu or indemnity selection.

It is true that if at the time the Railway Company selected the land in suit it had been subject to an existing claim, previously initiated, and then intact of record, it would not have been open to selection by the Railway Company. But that is all the cases cited in appellant's brief mean. And we have no quarrel with that proposition. Nevertheless, as the Department has repeatedly held, and as the trial court holds, a blanket application for survey *(even if valid and effectual, as the application for survey now under consideration was not)* accomplishes no such result. And the rule which has been established by the practice of the Land Department and the decisions of the courts, that the initiation of a specific claim to appropriate particular land, allowed in a preliminary way by

the officers of the Land Department, and remaining intact of record, segregates the land against subsequent appropriation while the claim remains *sub judice* and undisposed of, has nothing to do with a case like this.

Again, as pointed out by the trial court, this rule applies only in cases where the prior application or entry has been *recognized or allowed*. "To have segregative effect an application or entry must in some way be accepted or recognized by the Land Department; having been allowed, even though erroneously, it is binding upon and segregates the land." (Record, page 143.) And the State's application for survey was never accepted, recognized or allowed, in any form, until January, 1905; and then, its recognition and allowance were expressly made to date from *January 18, 1905*, only. (Record, page 141.) The earliest departmental decision in any way upholding the validity of the application was that of *Thorpe v. State of Idaho,* 35 L. D. 640 (afterwards recalled and vacated) which was decided *June 27, 1907*. The Railway Company's selection was made *July 23, 1901*, three and a half years before the former and nearly six years before the latter date.

We may concede that if the lands had been "reserved" or "withdrawn" prior to the filing of the Railway Company's selection list, this would have barred the selection, under the language of the act of March 2, 1899. But in the first place it has been settled, so far as Departmental construction can settle it, that even a valid application for survey recognized and allowed by the Land Department does not operate to "reserve" or "withdraw" the land within the meaning of the act of 1899. In the next place, if that construction of the statute be disregarded, it is perfectly obvious that only a *valid* application for survey, or

at the very least an application recognized and allowed by the Department, could operate as a "reservation" or "withdrawal."

It seems unnecessary to argue that the application for survey is not a "claim or right" to the particular land, which "attached" or was "initiated" within the meaning of the act of March 2, 1899. The meaning of those words, as used in the public land law is too well settled by numerous decisions of the Supreme Court, many of which are cited in the Donohue case. And this definition was firmly established in public land law terminology long before the act of 1899 was passed. Such words apply only to a specific claim of right to appropriate particular land, fastened upon the land by the initial steps which the law requires for the appropriation thereof. They do *not* apply to a blanket reservation or withdrawal or the acquisition of a preference right under an act like that of August 18, 1894.

11.

The Railway Company's selection was made by filing a proper selection list in the local land office at Coeur d'Alene, in conformity to the provisions of the act of 1899 and the regulations and practice of the Department applicable to such cases. This selection list was duly accepted and allowed by the local officers, and the selection duly noted upon the records of that office. In accordance with the established practice the selection list was subsequently transmitted to the General Land Office at Washington and accepted there; although final action thereon was necessarily deferred until after survey. But the acceptance

and allowance of the selection by the local officers was never reversed or set aside; and the selection has remained "intact of record" at all times since the day the selection list was filed.

Now it is settled law that an entry or selection allowed by the local land officers, whether valid or not, *segregates* the land against every other form of appropriation under the public land law, until such entry or selection is regularly cancelled upon the records of the Land Department. While such entry remains intact of record and uncancelled, no rights can be initiated or secured by any subsequent settlement, entry, application or selection, notwithstanding such previous entry or selection is irregular or invalid—even though it be subsequently cancelled or rejected by the Department.

In the present case the Railway Company's selection was duly presented to and approved and allowed by the local officers (and subsequently by the Commissioner of the General Land Office and the Secretary of the Interior), and that selection stood of record, intact and uncancelled, at the time Delany made his alleged settlement on the land and at all times thereafter, until the issuance of patent. Therefore, this selection constituted a complete barrier against the attempt of Delany to acquire the land; and he secured no right under his settlement and application to enter; and this without regard to how far the status of the land may have been affected by the application for survey. So Delany's claim was properly rejected by the Land Department, however erroneous its allowance of the Railway Company's selection may have been.

And this is fatal to appellant's case. For it is familiar law that if error was committed by the Department in awarding patent to the Railway Company, it is not error of which Delany or his successor is entitled to complain. In cases like this it is not enough for the appellant to show error in awarding patent to his adversary; he must also show that if the law had been properly administered the patent would have been awarded to *him*. And if his application was rightly rejected, because the land was segregated against such claim as his at the time of his settlement and application to enter, a suit like this cannot be maintained.

Holt v. Murphy, 207 U. S. 407.

McMichael v. Murphy, 197 U. S. 304.

Hodges v. Colcord, 193 U. S. 192.

Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357.

Sturr v. Beck, 133 U. S. 541, 548.

Whitney v. Taylor, 158 U. S. 85, 93.

Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 644.

Witherspoon v. Duncan, 4 Wall. 210, 218.

Neff v. United States, (C. C. A. 8th Cir.) 165 Fed. 273, 281.

Germania Iron Co. v. James, (C. C. A. 8th Cir.) 89 Fed. 811.

James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597.

Weyerhaeuser v. Hoyt, 219 U. S. 392.

The foregoing cases demonstrate that the segregative effect of an entry or selection does not depend upon its in-

herent validity, but merely upon the fact that when presented it is recognized by the local officers and remains intact of record at the time a subsequent adverse claim is sought to be initiated. Whether valid or not it is a complete barrier against the attaching of any right by virtue of settlement, application, or otherwise, made while the prior entry or selection remains uncancelled of record. This is well explained in *Edith G. Halley,* 40 L. D. 393, where it is said:

> "In *McMichael v. Murphy,* (197 U. S. 304) the court held that a settlement on land already covered of record by another entry, valid upon its face, does not give such settler any right in the land, notwithstanding that the first entry might subsequently be relinquished or ascertained to be invalid by reason of facts dehors the record of such entry, and that the party first entering after the relinquishment or cancellation had priority over one attempting to enter prior to such relinquishment or cancellation. In that case, one who settled upon the land covered by a formal entry prior to its cancellation, was held to be inferior in right to the first applicant after the cancellation of the entry. In James v. Germania Iron Company, (C. C. C. A. 8th Cir. 89 Fed. 811, 107 Fed. 597) the court held that an entry of public land under the laws of the United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially cancelled and removed."

And there is no distinction in this respect between an ordinary homestead or other entry, and an indemnity or lieu selection accepted by the local officers and entered of record in their office.

Weyerhaeuser v. Hoyt, 219 U. S. 392.

Southern Pacific Railroad Co., 32 L. D. 51, 53.

Santa Fe Pacific Railroad Co., 33 L. D. 161, 162.

Santa Fe Pacific Railroad Co. v. Northern Pacific Ry. Co., 37 L. D. 593, 596.

Santa Fe Pacific Railroad Co. v. California, 34 L. D. 12.

Santa Fe Pacific Railroad Co. v. Northern Pacific Ry. Co., 37 L. D. 669, 671.

Coffin v. Moore (unreported), decided Jan. 10, 1911.

State of Idaho v. Northern Pacific Ry. Co., 42 L. D. 118, 123.

Eaton v. Northern Pacific Ry. Co., 33 L. D. 426.

Malone v. State of Montana, 41 L. D. 379.

Gallup v. Welch, 25 L. D. 3.

Hanson v. Roneson, 27 L. D. 382.

Northern Pacific Ry. Co. v. Wolfe, 28 L. D. 298.

Olson v. Hagemann, 29 L. D. 125.

Southern Pacific R. R. Co. v. California, 4 L. D. 437.

Southern Pacific Railroad Co. v. Cline, 10 L. D. 31.

George Schimmelpfenny, 15 L. D. 549.

St. Paul & Sioux City R. R. Co. v. Minnesota, 24 L. D. 364.

F. C. Finkle, 33 L. D. 233.

California & Oregon Land Co., 33 L. D. 595.

Santa Fe Pacific Railroad Co., 34 L. D. 119.

Porter v. Landrum, 31 L. D. 352.

O'Shea v. Coach, 33 L. D. 295.

Heirs of George Liebes, 33 L. D. 460.

Minnesota v. Leng, 25 L. D. 432.

Thomas v. Spence, 12 L. D. 639.

Some of the cases cited above involve railroad indemnity selections; some State school land indemnity selections; some State selections under general grants; and some lieu

selections under acts like those of June 4, 1897, and March 2, 1899. But it is probably unnecessary for us to point out the precise similarity, so far as concerns the application of the rule, between those various classes of selections —we think the most astute mind could find no basis for distinction between them in this respect.

In Weyerhaeuser v. Hoyt, supra, the Supreme Court of the United States quoted with express approval the language of Mr. Justice Van Devanter (then Assistant Attorney General) in *Southern Pacific Railroad Co.,* 32 L. D. 51, which runs as follows:

> "A railroad indemnity selection, presented in accordance with departmental regulations *and accepted or recognized by the local officers,* has been uniformly recognized by the Land Department as having *the same segregative effect as a homestead or other entry made under the general land laws.*"

This gives the rule the express sanction of the Supreme Court. But it is so firmly established by innumerable departmental decisions, and by the reasoning of cases where the Supreme Court and the Department have accorded segregative effect to homestead and other entries, that such sanction is hardly necessary.

The language thus quoted from *Southern Pacific Railroad Co.,* 32 L. D. 51, is also quoted with approval in *Santa Fe Pacific Railroad Co.,* 33 L. D. 161, 162, where it is further said:

> "A pending selection list is therefore given the same force in segregation of the land as an actual entry, and lands so conditioned are within the rule fixed by circular of July 14, 1899, 29 L. D. 29."

The circular referred to contains the language which, in *Holt v. Murphy,* 207 U. S. 407, the court quoted approvingly from *Stewart v. Peterson,* 28 L. D. 515.

In *Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co.,* 37 L. D. 593, the question was whether certain unapproved indemnity selections by the Northern Pacific Company (afterwards cancelled) segregated the land as against certain lieu selections proffered by the Santa Fe Pacific Company, and the Secretary said:

> "This contention may be disposed of by reference to the instructions contained in the circular of July 14, 1899, 29 L. D. 29, which are to the effect that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until such entry has been cancelled upon the records of the local land office. The term 'entry' as used in this circular has been construed uniformly to include any claim under the public land laws, which operates to segregate the land applied for from the public domain. The rule was promulgated in the interest of good administration, and it has been uniformly followed since its promulgation. Inasmuch as the record shows that the selections of the Northern Pacific Railway Company had not been cancelled at the time of the application submitted by the Santa Fe Pacific Railway Company, it follows that the latter selections were properly rejected."

The reason for the rule is more fully stated in a later case, carrying the same title and involving the same sort of controversy as the case last cited. This was *Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Company,* 37 L. D. 669:

> "The rule now in force and the one obtaining at the time the applications in question were presented is contained in 29 L. D., at page 29, and provides that

no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until such entry has been cancelled upon the records of the local office. The term 'entry' as used in these regulations has been uniformly held to include also any bona fide selection or application to locate."

In *Coffin v. Moore* (unreported, decided January 10, 1911) the Secretary said:

"It is true that an indemnity selection presented by a railroad company is not effective against the United States until approved by the Secretary of the Interior; that the Secretary's approval is essential to the validity of any such selection, as the statute provides that indemnity selections must be made under his approval. At the same time, however, it is absolutely necessary to a proper administration of the land laws that there should be some rule respecting the segregative effect of a railroad company's indemnity selection until such times as it can receive proper consideration from the officers whose duty it is to dispose of the same. Having under consideration the necessity for, and effect of, rules of the land department, the Circuit Court of Appeals for the Eighth Circuit has held that it is essential to the impartial exercise of such power as exists in the land department that rules and regulations should be adopted and steadily maintained establishing a uniform practice and method of procedure; that the legislation of Congress was ample for the establishment of such rules, and when promulgated they become a law of property and cannot be ignored by the Department to the subversion of rights acquired under them; and, further, that an established rule of practice of the land department that after a decision by the Secretary has been made cancelling an entry of public lands, no subsequent entry of such lands can be made until a decision has been officially communicated to the local land officers and a notation of the cancellation made on their plats and records, is a proper, just and reasonable rule and is in accordance with the policy of Congress which makes the local offices the place for the initiation and

establishment of all claims under its laws. See *Germania Iron Company v. James, et al.,* 89 Fed. Rep. 811."

As explained in many of the decisions cited above, and also in the opinion of the Court of Appeals in *U. S. v. C. M & St. P. Ry. Co.,* 160 Fed. 818, the element upon which the segregative effect of an entry or selection depends is its *recognition* by the Land Department. As the Court says in the case last cited:

> "The cases * * * all disclose an assertion of a right to certain land by claimants *which was recognized in some manner by the Land Department. We understand the crucial test of segregation is found in such recognition.* The right or claim, in order to constitute a segregation, must be such as in some manner, either by receipt of fees for entry, permission to file upon the land, noting the filing upon tract-books, submission to a commission under treaty obligation, or other like affirmative action of the Land Department, discloses a recognition of the claim, or discloses some privity between the claimant and the United States."

And it is uniformly held that the acceptance of an application to enter or select by the local land officers, the receipt of fees by them, or the notation of the entry or selection upon the records of their office, is enough to give it segregative effect; regardless of whether this action is recognized, sanctioned or approved by the Department or the General Land Office, and regardless of whether the entry or selection is ultimately held valid or invalid.

There is some conflict of Departmental decision as to whether a selection of unsurveyed land has the same segregative effect that an entry or selection of surveyed land, has. But an examination of the authorities cited will

demonstrate that the reason for the rule is the same in either class of cases. And in *St. Paul, Minneapolis and Manitoba Railway Co. v. Donohue,* 210 U. S. 21, 40, it was held that a mere settlement on unsurveyed lands was sufficient to work segregation thereof against subsequent claims; which is, of course, conclusive authority against the suggested distinction between surveyed and unsurveyed lands with respect to the segregative effect of a selection thereof.

12.

Throughout appellant's brief it is asserted that Delany went on the land in the belief that it was free from any prior claim; that he had no knowledge or notice of the Railway Company's selection; that the records of the Coeur d'Alene Land Office did not show that the land had been selected by the Company; and that a search of those records by Delany, or anyone acting for him, would not have disclosed the fact. Now in the first place there is nothing in the evidence to justify the statement that Delany was not aware that the land had been selected by the Railway Company or that he believed the land to be free from other claims. And in the second place it is not true that the records of the Coeur d'Alene Land Office did not disclose the Company's selection. In fact the most casual inspection or inquiry at the Coeur d'Alene office would have elicited this information. As this Court said in the West case (221 Fed. 30):

"The selection list was filed in the Local Land Office, and this was notice to all parties that the Railway Company claimed the land."

Respectfully submitted,

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Counsel for Appellees.

Note: *Attention is called to the memorandum of errata in the printed record, and to the index of exhibits in the record, which appear on the following pages.*

APPENDIX.

MEMORANDUM OF ERATA IN PRINTED RECORD.

The index to the abstract of evidence is incorrect, in that no mention is made of the testimony of Clay Tallman, Commissioner of the General Land Office, taken by deposition, which begins on page 67 and ends on page 79 of the record. This matter is incorrectly indexed as the testimony of Ira McPeak.

The index of exhibits is insufficient to identify the various documents from the files of the Commissioner of the General Land Office introduced in evidence as plaintiff's Exhibits 2-A, 2-B, 2-C and 2-D. See the index to exhibits printed on the page next following this.

Page 67 of record, eighth line from the bottom, the township number should be "45" instead of "34".

Page 91, 9th line from the top, the month should be "July" instead of "January".

The various documents making up the plaintiff's exhibits are insufficiently separated. If a separating line be drawn in the places indicated as follows, the documents will be more intelligible:

Page 86, between lines 18 and 19.

Page 107, immediately below the words "Approved Sept. 25 1901" near the bottom of the page, and just above the date "June 4, 1909".

Page 112, between the 8th and the 9th lines (just above the heading "Department of the Interior").

Page 113, between the 7th and 8th lines (just above the heading "Department of the Interior").

Page 115, just above the heading "Department of the Interior" near the bottom of the page.

Page 117, between the 11th and 12th lines (just above the heading "Department of the Interior").

Page 117, immediately above the 6th line from the bottom of the page.

Page 119, between the 15th and 16th lines.

Page 121, between the 8th and 9th lines.

Page 122, between the 6th and 7th lines.

Page 125, immediately before the last line on the page.

Page 135, between the 4th and 5th lines.

INDEX TO EXHIBITS IN PRINTED RECORD.

(Note: The index appearing in the printed record does not sufficiently describe the exhibits, some of which consisted of numerous papers and documents from the files of the Commissioner of the General Land Office. The following index to exhibits is therefore submitted, for the convenience of the Court.)

Plaintiff's Exhibit 2-A..... 79-97

Application for Survey made by F. W. Hunt, Governor of Idaho, July 5, 1901..... 79

Letter, U. S. Surveyor Gen'l to Commissioner Gen'l Land Office, July 10, 1901, transmitting State's application for survey 80

Letter, Commissioner to Surveyor Gen'l. July 19, 1901..... 82

Letter, Commissioner to Surveyor Gen'l, Feb. 12, 1902..... 83

Letter, Commissioner to Gov. Hunt, Feb. 10, 1902..... 84

Notice by Register of State Indemnity Selection July 30, 1909 85

Decision of Commissioner July 16, 1914, holding State selections for cancellation..... 86-97

Plaintiff's Exhibit 2-B; Commissioner's "Clear List", Oct. 1, 1915, approved by Secretary..... 97-102

Plaintiff's Exhibit 2-C..... 102-115

Northern Pacific Selection List No. 71, filed July 23, 1901... 102-107

Northern Pacific Redescriptive List, filed June 4, 1909..... 107-112

Letter, Director U. S. Geological Survey to Commissioner, May 13, 1915..... 112-113

Letter, Commissioner to Register and Receiver, promulgating departmental decision cancelling State selections, June 28, 1915..... 113-115

Plaintiff's Exhibit 2-D..... 115-127

Letter, Register to B. M. Delany, Aug. 31, 1909, giving notice of cancellation of homestead entry..... 115

Letter, Commissioner to Delany, Dec. 16, 1909..... 115-117

Decision of Commissioner cancelling homestead entry July 9, 1915..... 117-119

Decision of Secretary on appeal, holding homestead application for rejection, Nov. 18, 1915..... 119-121

Decision of Secretary, Jan. 29, 1916, denying motion for rehearing of his decision of Nov. 18, 1915..... 121-122

Letter, Commissioner to Register and Receiver, Feb. 11, 1916, promulgating Secretary's final decision of Jan. 29, 1916 122

Decision of Secretary, March 11, 1916, denying petition of homestead entryman Delany for exercise of supervisory power 123-125

Abstract of a portion of Exhibit 2-D, showing filing of plat of survey and proceedings in local land office and General Land office and before Secretary on Delany's homestead application 125-127

Defendants' Exhibit No. 1; Patent to Northern Pacific Railway Company 127-130

Defendants' Exhibit No. 2; Notice of preference right under State's application for survey, dated January 20, 1905, from Commissioner to Register and Receiver..... 130-132

Defendants' Exhibit No. 3; Decision of Secretary Oct. 30, 1914, in case of George A. McDonald v. Northern Pacific & State of Idaho..... 133-135

No. 3276.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

ALRA G. FARRELL, SUBSTITUTED FOR BELDON M. DELANY,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Appellees.

REPLY BRIEF OF APPELLANT.

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Appellees.

REPLY BRIEF OF APPELLANT.

The re-statement of facts by appellees has the effect of giving prominence and emphasis to the facts which are more important for the defense. The re-statement also gives opportunity for appellants to use their conclusions as to the ultimate facts, or conclusion of facts to be drawn from the record, where such conclusions are permissible, but as we shall call attention to any particular fact on which we place reliance in the course of the argument, it will not be necessary to notice appellees' statement of the facts, but we will briefly reply to a portion of the argument, replying to each article of appellees' brief under the same numeral.

I.

Appellees' contention that the appellant has failed to show that she, and her ancestor from whom she derives title, has fully complied with the requirements of the homestead laws with respect to residence, improvements and cultivation, is not well founded.

The learned trial court found that the homestead entryman, Delaney, had complied with the law, and as the appellees have taken no appeal, it does not matter that the evidence on that score is weak. Delaney was dead, and much of the best evidence of his claim died with him, but in view of the fact that the evidence of appellant was limited on the trial at the suggestion of the trial court and counsel for appellees, we think appellees are not in a position to urge this objection. (See record page 65.)

II.

Appellees start their argument under this subdivision with an attempt to shorten the distance of the land in suit from the nearest surveyed line by one-half mile, by claiming that the Railroad Company selected all of Section 20 and not merely the northeast quarter thereof, but all of Section

20 is not involved in this action, nor is the appellant concerned with any land other than the northeast quarter thereof.

The contention that the sufficiency of a description such as is involved in this action is to be determined without reference to the difficulty the settler must be under in determining the location of the land due to the lack of Government survey, supported by quotation from Miles vs. Northern Pacific Railway Company, unreported, is, in our opinion, equivalent to saying that any difficulty the settler might be under in determining the location of the land due to the lack of proper or reasonable description, could not affect the rights of the Railway Company because the Department has found that the description used by the Railway Company complied with the law. In other words the Department is not concerned with the requirement of law that the appellees shall describe the land with a reasonable degree of certainty, so as to advise intending settlers of the claims of the Railway Company, but if the language used in the description is such as is suitable for the requirements of the Department, the settler cannot complain, even though as to him it is entirely without value, because he is wholly unable to determine

therefrom what particular lands are concerned.

By adopting the theory that the purpose of these requirements of the Act under consideration was solely to aid, and for the sole use and benefit of the Department in keeping of its records, the Department has exactly reversed the Act from what Congress intended. A reading of the Act is sufficient to convince any one that Congress intended the filing of the application of the Railway Company to select public lands of the United States, to be, and to constitute in itself, an effectual notice to all intending settlers of the claim of the Railway Company. Not merely a something which might by some peculiar process with which the settler was unfamiliar be made into a notice, but a present notice. The question is not primarily one of description, but one of notice.

Counsel claim this system had become an established practice at the time appellees attempted to select and at the time of the settlement of appellant. This might be urged as an excuse for the Railway Company, and it might be said that because the Department misled the Railway Company, the appellant should suffer, which seems to us to be devoid of logic, but such is not the case. The fact is, there was no such established practice

or requirement or regulation at that time. Counsel says there were prior to 1908. We say there were none in 1901 or 1903. Our contention is sustained by the decision of Northern Pacific Railway Company vs. State of Idaho, 39 L. D. 583, cited in our opening brief, and followed in the case of Carrie E. Shearer vs. Northern Pacific Railway Company, defendant, and Edward Rutledge Timber Company, intervenor, decided March 5, 1913, unreported, but copies of which we will be pleased to file with this brief.

In the Shearer case, the Commissioner, discussing this same application of the State of Idaho, and the right of the homestead as against the attempted selection on the part of the Railway Company under the Act of March 2nd, 1899, being a case raising the identical questions raised in the case at bar, said:

> "Subsequently, instructions were requested of the Department as to the State's said application, list No. 9, with others, and the company's selections in conflict therewith, and acting under departmental instructions of March 20, 1911 (39 L. D. 583), this office, on May 8, 1911, rejected the State's application list No. 9, with others, for University purposes, as excess selections.
>
> Said departmental instructions directed this

> office, in consideration of the settlement claims, to reject such as are based upon settlement made subsequent to July 31, 1905, the date the company filed the additional list, adjusting the selection to the public survey, and stated that, as to settlements made prior to that date, if made in good faith, by a qualified homesteader, and since maintained in accordance with law, priority would be accorded, and, upon allowance of entry for lands so settled upon, the company's selections would, to that extent, stand rejected."

Appellees' argument under this sub-division, as summed up, is based on the assumption that the nearest surveyed line is seven miles distant from the land in question, and on the further assumption that the conditions are exactly the same as in the West case. The record shows, and we have heretofore stated, that the distance to the nearest surveyed line was seven and one-half miles, or more than twice the distance shown in the West case, and that it was over a wild, mountainous and heavily timbered country where the difficulty of tracing a line is probably as great as in any place that could be found, and while the number of miles may not be considered great by appellees, it is safe to say that the real obstacles and difficulties to be overcome in tracing this seven and one-half miles are as great, and it would require as much effort and expense as to trace an ordinary line seventy-

five miles. We submit that if this line was actually seventy-five miles long, no Court or Department would have the temerity to say that such a description was reasonable. The doubling of the distance in this case multiplies the difficulties, uncertainties and cost of running this line, not by two but four or more; hence any attempt to place this case in the same class as the West case must utterly fail.

III.

(1) Appellees' first contention under this head, after discussing the history of the Act of August 18, 1894, is that the Act of August 18, 1894, is in derogation of the common right to appropriate public lands under other laws, and hence it must be strictly construed and strict performance required of those steps upon which its operation is conditioned.

A casual comparison of the Act of August 18, 1894, with the Act of March 2, 1899, is enough to convince any one that the rule stated in the foregoing contention is just as applicable to the provisions of the Act of March 2, 1899, under which appellees claim title, as it is to the Act of August 18, 1894. We can see no difference in the Acts in this respect. If this rule of construction is applied to the Act of March 2, 1899, then appellant must

prevail, for the reason that it was evidently the intention of Congress in passing the Act of March 2, 1899, to provide for notice to settlers entering the unsurveyed public lands with the intention of establishing a home thereon and thereafter entering the same under the homestead laws of the United States. While we find no fault with the rule of construction claimed, we do think that it ought to be applied wherever it is applicable.

We cannot agree with appellees' statement of the record with respect to the application of the State of Idaho for survey, wherein on page .... of their brief they say:

> "Passing upon the application for survey in the light of these facts, the Commissioner, on July 19, 1901, held that the application in question was excessive and improvident, and declined to recognize or allow it. Due notice of this action was given to representatives of the State, but no appeal from the decision was taken. It has since been established that the action of the Commissioner was within the authority vested in him by law; that his order was subject to appeal under the rules and practice of the Land Department, and if erroneous could have been corrected on appeal; and that whether erroneous or not, the order became final and conclusive upon the lapse of the prescribed period without appeal."

The only thing in the record pertaining to this

matter is a letter from the Commissioner of the General Land Office to the United States Surveyor General of Idaho, in which he requests the Surveyor General of the State to procure a report from the Governor of the State of Idaho as to whether or not the State could not satisfy its grant out of lands already reserved. In which letter the Commissioner expressly states that "Pending the receipt of the report of the Governor *no action will be taken* in the matter of withdrawing from further disposal the lands," etc. (See record pages 81-82.)

It is true that the Commissioner on July 16, 1914, or thirteen years later, says in rejecting the State's application:

> "That on July 19, 1901, the Commissioner refused to withdraw the townships in question upon the ground that the areas embraced in previous withdrawals were sufficient to enable the State to satisfy its several grants."

It is this loose handling of old records by the Commissioner of which we complain. Can the Commisisoner, by merely asserting the fact, make black really white, or is it perhaps camouflage that sometimes deceives? Is it any wonder that the Court is asked to review a record which discloses such gross carelessness in the handling of facts? (See record pages 86 to 97.) In this connection

we desire to call the Court's attention to the fact that in this very decision of the Commissioner, and on page 81 of the records, he says:

> "It was held that pending the receipt of a report from the Governor, no further action would be taken on the application for withdrawal," etc.

And again on page 92 of the record he quotes from a decision of the department, holding:

> "That the withdrawal for the benefit of the State did not attach until July 15, 1901, the date the application was received in this office (G. L. O.), and was not a bar to the reservation of the lands for forestry purposes," etc.

This statement of the Commissioner is also made in the face of the further fact that the lands in question were actually withdrawn under date of January 20, 1905, after the State had deposited the necessary cost of survey. (See record pages 131-2.)

It is this statement which seems to have misled the trial court, and a careful reading of his opinion will show but for this statement in the record the learned trial court would have reached a different conclusion.

(3) In this sub-division of their brief counsel for appellees contend that:

> "If there was no valid application for survey, there was no reservation or withdrawal of the lands, under any possible construction of the Act of 1894. It is only upon the theory that the land was reserved or withdrawn as the result of an application for survey, effective before selection by the Railway Company on July 23, 1901, that the validity of that selection can be questioned."

This, of course, is exactly the contra of the position taken by appellant in her opening brief, and based upon such eminent authority as various Federal Courts, including the Supreme Court of the United States, while appellees' contention is supported by citations from the Land Department only, but it is more convenient to reply to this contention under and in connection with sub-division 10.

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(4) Under this sub-division of appellees' brief they adopt as the settled and conclusive record in this case, the statement of the record which they have theretofore, and in the opening of their brief, "constructed," which in its final analysis is a conclusion of fact. Of course if they are permitted to use this statement as the record in the case, it

would harmonize with their argument. We refer more especially to the statement of appellees contained in the second paragraph under this head, with reference to the assumption of the trial court that the Department rejected and disallowed the application for survey. We contend that the record shows that no such action was taken, as it was not taken at the time. The reference in a ruling of the Department thirteen years later contrary to the record does not change the fact. Hence all of the argument of appellees with respect to the jurisdiction of the Commissioner, and this ruling of the Commissioner becoming final by reason of no appeal being taken, is, in our opinion, entirely beside the question, and has no foundation of fact upon which it can rest.

Counsel seem to lay great stress and put great store on the statement that while the earlier decisions held the application of the State to be valid and binding, it was subsequently found that these decisions were due, "partly to failure to give due consideration to the facts surrounding the application for survey, and partly to an erroneous view of the functions and authority of the Commissioner in proceedings under the Act of 1894." While the facts really are that the later decisions

referred to by counsel, and the decisions which did give due consideration to the "functions and authority of the Commissioner in proceedings under the Act of August 18, 1894," were all rendered and made after the State of Idaho had no longer any interest whatsoever in this application, and after the State had selected the full quantity of land which it was entitled to select. Then the Commissioner of the General Land Office, by reading into the record as of a date thirteen years prior thereto, made this wonderful discovery, that his predecessor in office had failed to give "due consideration to the facts surrounding the application for survey."

(6) We feel grateful to counsel for appellees for the argument under this head as to the proper rule of statutory construction thought to be applicable under the provisions of the Act of August 18, 1894. Applying this rule, and the reasons for the rule so ably stated, to the Act of March 2, 1899, we believe the Court will be irresistibly drawn to the conclusion that it was the intention and purpose of Congress to provide such notice as should be actual notice to intending settlers upon the public domain of any rights which the Railway Company might seek to initiate under this Act.

The argument is all made for the purpose of taking out of the Act of August 18, 1894, that clause which reads as follows:

> "And the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise."

If this clause was eliminated from the statute the statute would have absolutely no force or effect. This argument is advanced evidently for the reason that if this clause can be modified by proper construction then it may be deprived of its self-executing power, and the reservation be construed to take effect only when the Commissioner of the General Land Office says it is reserved.

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(8) The contention that certain rights have become vested upon the erroneous practice of the Land Department can only apply to the Railway Company and the Timber Company. The fallacy of this argument lies in the fact that it assumes that the rights of these Companies were initiated under such practice as they contend for. But we have shown that they were not so initiated.

---

(9) Counsel have not caught the point sought to be made by appellants in citing the Donahue case. That case established the rule that where any claim has attached to land at the time the Railway Company attempted to select that no matter if it is thereafter released, relinquished or abandoned, the land becomes again a part of the public domain of the United States, but was not subject to entry by the Railway Company.

---

(10) Counsel attempt to distinguish the application of the State of Idaho for survey, from all other methods or attempts to appropriate public lands, and claim that this particular method of appropriation does not initiate a claim to the land, and hence does not except these lands from lands which the appellees were entitled to enter. In other words, they claim that the appellees might file their application to select this land subject to the prior and superior rights of the State to appropriate it. This is contrary to the view expressed by the Courts in numerous cases.

In the case of McIntyre vs. Roeschlaub, 37 Fed. 556, cited in our opening brief, a homestead entry was made on the land in question by one who was an alien and not entitled to enter any land under

the homestead laws. The successor of the Railway Company in that case contended that the attempt to enter the land under the homestead laws having been made by an alien it was void, and therefore no right or claim attached to the land. In disposing of that question, the Court said:

> "Within the reasoning of that case, I think the contention of the complainants cannot be sustained. So far as the records of the land-office disclose, a proper homestead entry had attached. The Government had accepted the filing of the entry by Mary Hooper. Whether it should afterwards permit that entry to ripen into a perfect title, or should challenge her right to perfect the entry, were matters resting solely in the discretion of the government. The right to inquire into the validity of the proceedings in the land-office, regular in form, was not granted to the railroad company. Such right of inquiry remained personal to the Government. It occupied the position, not of a vendor, but of a donor. It limited its gifts to lands to which a homestead right had not attached. Whenever it accepted a homestead entry, its acceptance removed the land from the terms of the grant. What should become of the matter thereafter as between the person making the entry and the Government was a matter that did not affect the railway company. It had no right to inquire. The Government might have waived all the informalities and defects in the person, or in the occupation, and issued its patent. Whether it did or did not was a matter of which the railroad company could not complain. It was

> enough for it, that upon the face of the records there was an apparently valid homestead entry, one which the Government recognized, and one which it might finally permit to ripen into a perfect title. The homestead claim, whether good or bad, in the language of the act, '*attached*'; and that is all the railroad company could inquire into. That being settled, the land did not pass under this grant."

McIntyre vs. Roeschlaub, 37 Fed. 556.

In case of Southern Pac. Railroad Company vs. Brown, 75 Fed. 85, cited in our opening brief, the land was found by the Government survey to be within the limits of a Mexican grant, and thereafter in a proceeding pending at the time of the congressional grant, the land was found to be not within the limits of the Mexican grant, and that the holder of the Mexican grant had no right whatsoever to it.

In disposing of that case, the Court said:

> "Not only that, but a survey had been made under the authority of the government which included the land within the limits of the Jurupa. These facts excluded the land from the grant made to the railroad company, and it is not permitted to maintain its suit upon the ground that it was finally determined that the contention of the claimants to the Jurupa was not well founded; for, as before stated, *it is not the validity of such claim, but the fact that it was made, that excluded the lands in*

controversy from the category of public lands, within the meaning of that term as used in all the railroad land grants. This general and controlling principle has been so frequently decided by this court and by the Supreme Court of the United States that a bare statement of the facts is sufficient to show that the lands were *sub judice,* and did not pass to appellant by reason of any of the provisions of the act of March 3, 1871. Amacker v. Railroad Co., 7 C. C. A. 518, 58 Fed. 851; Railroad Co. v. Maclay, 9 C. C. A. 609, 61 Fed. 554; Newhall v. Sanger, 92 U. S. 761; Railway Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228; Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112; Land Co. v. Griffey, 143 U. S. 32, 41, 12 Sup. Ct. 362; Bardon v. Railroad Co., 145 U. S. 535, 12 Sup. Ct. 856; Whitney vs. Taylor, 158 U. S. 85, 15 Sup. Ct. 796."

Southern Pac. R. Co., v. Brown, 75 Fed. 85. "The location of a tract of public land by an alleged beneficiary under the seventh clause of the second article of the treaty of September 30, 1854 (10 Stat. 1109), between the United States and the Chippewa Indians of Lake Superior, *segregates the tract from the public domain* and appropriates it to private use.

While such a location remains in force, Porterfield warrants issued under the act of April 11, 1860 (12 Stat. 836), cannot be lawfully located on the same land because that land has been otherwise appropriated by the prior location whether right or wrong." (*Syllabi.*)

Hartment v. Warren, 76 Fed. 157.

The contention of the holder of the Porterfield warrants was that the "alleged beneficiary" was not a member of the Chippewa tribe, and hence had no capacity to take under the law.

> "The entry of public land under the laws of the United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled or removed."
>
> *James v. Germania Iron Co.*, 107 Fed. 597.

In the case of Newhall v. Sanger, reported in 92 U. S. 761, the Supreme Court, in discussing the Act of July 1, 1862, being the Act granting every alternate section of public land, etc., said:

> "We held that they attached only to so much of our national domain as might be sold or otherwise disposed of, and that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves. Our decision confined a grant of every alternate section of "land" to such whereto the complete title was absolutely vested in the United States. The acts which govern this case are more explicit, and leave less room for construction. *The words, 'public lands," are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.* That they were so employed in this instance is evi-

> dent from the fact that to them alone could, on the location of the road, the order withdrawing lands from preemption, private entry and sale, apply."

In this case the Court found that thes lands were *sub judice* at the time of the passing of the Act, and consequently the use of the words, "public lands," the lands not being at that particular moment open for selection, were not considered public lands within the meaning of the Act.

In the case of Leavenworth L. & G. R. R. Co. vs. United States, 92 U. S. 733, in discussing a claim made under a railroad grant to lands, the absolute title in fee of which belonged to the United States, but to which the Osage Indians had a right of occupancy, the Supreme Court said:

> "And such grants could be treated in no other way, for Congress cannot be supposed to have thereby intended to include lands previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of them was not necessary, because the policy which dictated the grants confined them to lands which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. The legislation which reserved them for any purpose excluded them from disposal in the manner that the public lands are usually disposed of, and this Act discloses no intention

> to change the long continued practice with respect to lands set apart for the use of the Government or of the Indians. As the attempted transfer of any part of an Indian reservation, secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.
>
> 'A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.' 1 Bac. Abr. 247. The Treaty of 1825, secured as to the Osages the possession and use of their lands so long as they may choose to occupy the same and this Treaty was only the substitute for one of an earlier date with equal guaranties."

In case of Northern Pacific Railway Company vs. Musser-Sauntry Land, Logging & Mfg. Co., 168 U. S. 607, the Supreme Court of the United States in discussing the affect of a reservation of certain public lands by the Secretary of the Interior, which reservation was made for the purpose of enabling the Railway Company to select its lieu lands therefrom, said (which we submit is identical to the case at bar, where the lands were reserved that the State of Idaho might select therefrom such lands as it was entitled to):

> "But beyond the significance of the word 'reserved,' alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. 'Otherwise appropriated' is one term

of description, and evidently when the withdrawal was made in 1866 it was an appropriation of these lands so far as might be necessary for satisfying that particular grant. It is true it was not a final appropriation or an absolute passage of title to the state or the railway company, for that was contingent upon things thereafter to happen, first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such deficiencies. Again, in the description, are the words, 'free from preemption or other claims or rights.' Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply 'free from rights,' but 'free from claims,' and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. Northern Pacific Railroad Company v. Sanders, 166 U. S. 620 (41:1139). And such is the general rule in respect to railroad land grants."

The doctrine of the foregoing cases has been reviewed and applied in case of Northern Lumber Company vs. O'Brien, 139 Fed. 614, to a withdrawal made for the purpose of enabling the Northern Pacific Railroad Company to select lieu lands for the purpose of satisfying its grant. This case is also identical with the case at bar. The numerous authorities cited in that case makes it unnecessary for us to cite further authorities here. In that case the Court said:

> "The grant to the Northern Pacific Railroad Company was one in praesenti and was in terms confined to 'public land.' St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S. 1, 5, 11 Sup. Ct. 389, 35 L. Ed. 77. Land not public at the date of the grant was not granted, even though it subsequently became of that character. Bardon v. Northern Pacific R. R. Co., 145 U. S. 535, 539, 12 Sup. Ct. 856, 36 L. Ed. 806; Northern Pacific Ry. Co. v. DeLacey, 174 U. S. 622, 626, 19 Sup. Ct. 791, 43 L. Ed. 1111; United States v. Southern Pacific R. R. Co., 146 U. S. 570, 594, 606, 13 Sup. Ct. 152, 36 L. Ed. 1091. The words 'public land' have long had a settled meaning in the legislation of Congress, and when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. Bardon v. Northern

Pacific R. R. Co., supra; Wilcox v. McConnell, 13 Pet. 498, 513, 10 L. Ed. 264; Leavenworth, etc. R. R. v. United States, 92 U. S. 733, 741, 745, 23 L. Ed. 634; Newhall vs. Sanger, 92 U. S. 761, 23 L. Ed. 769; Doolan v. Carr, 125 U. S. 618, 630, 8 Sup. Ct. 1228, 31 L. Ed. 844; Cameron v. United States, 148 U. S. 301, 309, 13 Sup. Ct. 595, 37 L. Ed. 459; Mann v. Tacoma Land Co., 153 U. S. 273, 284, 14 Sup. Ct. 820, 38 L. Ed. 714; Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; Scott v. Carew, 196 U. S. 100, 109, 25 Sup. Ct. 193, 49 L. Ed. 403. From the time of the earliest railroad land grants it was the practice of the chief officers of the Land Department, to whom was committed the administration of such grants, to withdraw from settlement, entry and sale the public lands along the line or route of the road so aided, in advance of its definite location, in order that the lands might be preserved for the ultimate satisfaction of the grant. *Such withdrawals, where not made in opposition to the terms of the grant or other congressional enactment, have been uniformly declared to be reservations made by competent authority and to be efficient to remove the lands therein from the category of public land and to exclude them from subsequent railroad land grants containing no clear declaration of an intention to include them; and this, even though it subsequently transpired that the withdrawal was ill-advised, or that the lands therein were not required for the satisfaction of the grant.* Wolcott v. Des Moines Company, 5 Wall. 681, 688, 18 L. Ed. 689; Riley v. Welles, 154 U. S. 578, 14 Sup. Ct. 1166, 19 L. Ed. 648; Wolsey v. Chapman, 101 U. S. 755, 768, 25 L. Ed. 915;

> Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 46, 54, 55, 15 Sup. Ct. 1020, 40 L. Ed. 71; Spencer v. McDougal, 159 U. S. 62, 15 Sup. Ct. 1026, 40 L. Ed. 76; Northern Pacific R. R. Co. v. Musser-Sauntry Co., 168 U. S. 604, 607, 18 Sup. Ct. 205, 42 L. Ed. 596."

Before passing this subject, however, we cannot refrain from calling the Court's attention to a decision of this Court which we consider directly in point. We refer to the case of Northern Pacific Railway Company vs. Wismer, 230 Fed. 591, which is a contest between the Railway Company claiming under its grant, Act of July 2, 1864, and the defendant claiming through the Indian title growing out of an occupancy of these lands by a Nomadic tribe of Indians at the time the Railway definitely fixed its line of railroad, and filed a plat thereof in the office of the Commissioner of the General Land Office. The facts bring the reason and application of the rule within the case at bar. In that case the Court said:

> "It is useless to cite the numerous other decisions of the Supreme and other courts to the same effect. Nor is it at all material that the outstanding claim be valid; for the Supreme Court, as well as other courts, have frequently decided that it is not the validity of such claim but the fact that it existed at the time of the definite location of the railroad, that excluded

> the lands in controversy from the category of 'public lands' to which alone the company's grant attached. Decisions to that effect are also very numerous. See among them, Newhall v. Sanger, 92 U. S. 761, 765, 23 L. Ed 769; United States v. So. Pac. R. R. 146, U. S. 570, 606, 13 Sup. Ct. 152, 36 L. Ed. 1091; United States v. So. Pac. R. R. Co. (C. C.), 76 Fed. 134, and cases supra."

Under this sub-division of their brief appellees concede the rule of the Donahue case to be as we have heretofore stated it but rely on the "fallacy of the doctrine" as exposed in the opinion of the trial court, namely, the failure to distinguish between the "blanket application," as the application of the State for survey is called, and a specific claim to appropriate particular lands in which class they place their application to select.

This doctrine has been repudiated by the Supreme Court of the United States in case of Musser-Sauntry L. L. & Mfg. Co., *supra*, in which case the lands were withdrawn from appropriation solely for the purpose of enabling the Railway Company to select a *portion of these lands* if its necessities required by reason of a failure of land in place. In other words, there was a possibility that the Railway Company might need some of these lands. They were not making a claim to any one tract

more than another, and were never intending to appropriate all of these lands. The Supreme Court has expressly held that this was an existing "*claim*" against this land. To previous contentions appellees add the further proposition that, under the rule of decision of the Land Department, an application in order to have segregative effect must be "*recognized or allowed.*" Well, the State's claim was accepted and recognized, and it was not disallowed until thirteen years later, and after the State had satisfied its grant, and the early decisions of the Department were to the effect that the claim of the State was superior to that of the Railway, but it will surely not be contended that this rule goes so far as to give the Department the right to reject a valid claim and award the lands to one not entitled to them, and as we stated in our opening brief, the right to determine whether there was a necessity for the withdrawal of these lands to enable the State to satisfy its grant, was by Congress reposed in the Governor of the State of Idaho, and the statutes under consideration says: "And the lands which may be found to fall within the limits of such township or townships as ascertained by the survey *shall* be reserved upon the filing of the application for

survey *from any adverse appropriation by settlement or otherwise,"* etc. Here the statute withdraws the land without any action on the part of the Land Department. The statute is mandatory.

(11) The record in this case shows that, but for the claim of the Railway Company, these lands would have been patented to Delaney. The decisions of the various officers of the Land Department in effect so state. (See record pages 93-96-97.)

The patent issued to the Railway Company is void for the reason that the lands involved not being of the class of lands granted, the officers of the Land Department were without jurisdiction to award the patent, as shown by the authorities cited in our opening brief. Under this state of the record the authorities cited by appellees under section 11 do not apply.

But appellees have contended that the Land Department was acting within the law in receiving and holding the application of the Railway Company to select "subject to the superior right of the State." Is it proper for them to ask to have this rule applied to them, and at the same time deny the rule if it protects the appellant?

The rule here cited by appellees to the effect

that while an "entry of land" remains of record and uncancelled on the records of the Land Office no rights can be recognized or secured by a subsequent application to enter the lands, is based upon the Act of May 14, 1880, 21 Stat. at L. 140, Chapter 89 U. S. Comp. St. 1901, page 1392. Counsel have enlarged considerably upon the language of this statute.

This statute is for the protection of the successful contestant in contest cases only, and this statute and the rule of the Department promulgated under it, simply provide that the Department will refuse to recognize any application by a third party for the land involved in the contest until the record is clear of all former entries, for the purpose of carrying out this statute and securing to the successful contestant a preference right of entry, and this is all that is decided in case of Holt vs. Murphy, 207 U. S. 407, 52 L. Ed. 271, cited by appellees at the head of their long list of cases under this sub-division. The Holt case is a contest case and during the pendency of the appeal the entryman relinquished in favor of a third party after a decision that neither contestant was entitled to the land.

Deofield v. Otterson, 37 L.D. 65
Dowlby vs. Hays, 34 L.D. 370
Decided Jan.10,1906.

In McMichael vs. Murphy, 197 U. S. 304, 49 L. Ed. 767, also cited by appellees, the Court simply held that no settlement right could be acquired as against a *contestant* during the life of a *contest*, and that a relinquishment of the rights of the entryman induced by the contest conferred a superior right of entry as against any rights attained by the settlement of the contestant.

In Hodges vs. Colcord, 193 U. S. 192, 48 L. Ed. 677, the facts are identical with those in case of McMichael vs. Murphy, and decision of the Court announces no other or different principle, and so far as we have been able to find there is not a decision of any court cited in which a contrary rule of decision is announced.

In case of Weyerhauser vs. Hoyt, 219 U. S. 392, cited by appellees, 55 L. Ed. 258, the Supreme Court discussed the case of Sjoli vs. Dreschel, 199 U. S. 564, 50 L. Ed. 311, and in commenting on that case said:

> "The Sjoli controversy, succinctly stated, thus arose: A homestead settler went in 1884 upon land within the indemnity limits of the grant to the Northern Pacific Railroad Company. He erected a dwelling house and moved into it with his family and cultivated a portion of the land, all prior to the filing in 1885 of a

list of selections by the railroad company, embracing the tract settled upon by Sjoli. Although the settler had thus, prior to the filing of the list of selections, entered upon and improved the land with the intention of perfecting title under the homestead laws, his application to enter, for reasons which need not be here adverted to, was not made until subsequent to the filing by the railroad company of its list of selections. Relying upon this fact, the railroad company opposed the application of Sjoli, and required the Department to determine whether the railroad company, by the filing of its list of selections, could deprive the settler Sjoli of his rights, despite the fact that his settlement and improvement of the land had occurred prior to the filing by the company of its list of selections. The Land Department decided in favor of the settler, and a patent was issued to him.

The matter decided by this court in the Sjoli case arose from the bringing of a suit by Dreschel, as assignee of the rights of the railroad company, asserting that Sjoli held the land in trust for him as the grantee of the railway company, because the Land Department had, as a matter of law, erred in deciding that the rights of the settler, Sjoli, were paramount to the subsequent selection by the railroad company, since, at the time of the filing of such list of selections, no record evidence existed in the Land Department of the asserted settlement by Sjoli, or of his intention to avail of the benefit of the homestead laws. The action of the Land Department in maintaining the paramount right of the settler was sustained."

In the case at bar Delany for a period of about twelve years was engaged in a contest with the State of Idaho, and the rights of the Railway Company were not mentioned in this contest, and his homestead application was rejected for conflict with the selection of the State of Idaho. After the State's application had been rejected and on July 9, 1915, the Commissioner of the General Land Office on appeal rejected Delany's homestead application on the ground, among others, that the land was duly selected by the Railway Company prior to the date of the alleged settlement and date of filing the application of the homestead entryman. No question was raised at any stage of the proceedings in the Land Department as to the method of procedure adopted by the parties. The Land Department attempted to determine the rights of various parties as though the matter were a contest as to the rights of all the parties and as between the Northern Pacific Railway Company and Delany as their rights existed after the application of the State of Idaho had been rejected. Its decision is directly contrary to the decision of the Supreme Court in case of Sjoli vs. Dreschel, *supra*, where the application of the homestead entryman was made subsequent to the filing of the lieu selec-

tion list by the Railway Company. If, as a matter of fact, at the time of the decision of the contest between Delany and the Railway Company, the Railway Company had no right to the land under the established rule of the Land Department then existing, the application of Delaney should have been accepted because he was then contesting the rights of the Railway Company.

The rules of the Land Department with respect to the initiation of a contest, are merely rules of practice governing the procedure as to the bringing of the controversy within the jurisdiction of the Department. If the Department assumes jurisdiction of the controversy without requiring compliance with any of the rules of practice with respect thereto, such rules are waived, and the prevailing party cannot complain that the Department was without jurisdiction to determine the controversy and at the same time accept the benefits of its decisions.

In any event, it was clearly the duty of the Department to have cancelled the selection of the Railway Company at the time of the hearing of the contest between Delaney and the Railway Company and as Delaney was then keeping his tender of his application before the Department by his

appeal, to have then accepted his application as of that date. It matters not what angle we view the controversy from, it is still apparent that had the claim of the Railway Company been rejected as it should have been the land would have been patented to Delaney.

Delaney resided and made his home upon this land for twelve years and until the time of his death. He made many improvements thereon of more than $3000.00 in value. There can be no question of his good faith.

In the case of Lake Superior Ship Canal R. & I. Co. vs. Cunningham, 155 U. S. 384, 39 L. Ed. 193, cited in our opening brief, the Supreme Court sustained a settlement on lands within a railroad grant, made while the lands were reserved from entry.

Some confusion has arisen in decisions of the Department by a failure to distinguish between an application to enter lands where the right to consider and accept such application is within the jurisdiction of the Land Department and applications which the Department is without jurisdiction to receive because Congress has by law provided that such applications will confer no rights, *e. g.*, the lands in the case at bar were not of the class

which the Railway Company was entitled to select at the time of the attempted selection, because not free from claim. Any action by the Department on such an application, tending to confer any right on the applicant is wholly void, and the lands still in fact remain public lands for the action of the Department, being void *ab initio*, cannot deprive any one of any legal right he might have, such as the right to enter the land covered by such application.

There is a clear distinction between such a case and a case where the Department has jurisdiction to receive and determine the legality of the applications, for a mistake or error of the Department in the latter case would be voidable only and the Department would be acting within reason in requiring its records to be cleared before considering further applications covering the same land.

In the one case the Department erred in attempting to act at all. In the other it erred in attempt to discharge a duty which it might lawfully discharge. This confusion is further augmented by the fact that under the Railroad grants and Acts such as the one under which appellees claim even a void attempt to enter excludes the lands from the category of lands which they may select.

When the authorities cited by appellees under this sub-division of their brief are carefully examined and weighed in the light of this principle, nothing will be found to sustain their contention that while the Railroad Comapny in fact had no right to select the lands in controversy, yet because they selected them before Delany settled upon them, they must be permitted to retain them.

Their unlawful selection ripens into a perfect title in the face of twelve long years of litigation in the Land Department and the Courts.

It seems to us that this doctrine is so far from equity that it ought not to be considered seriously in a court of equity, especially in view of the well established rule of decision that "legislation respecting Public Lands is to be construed favorably to the actual settler."

We therefore most respectfully submit that the decree of the trial court should be reversed.

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